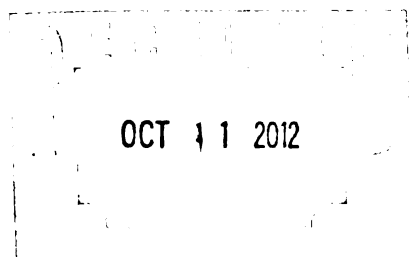


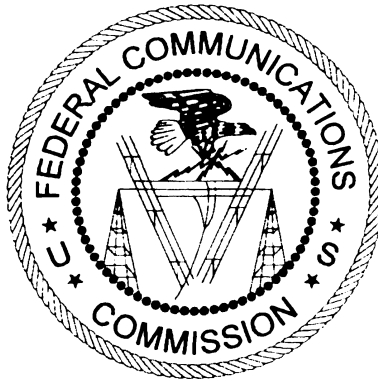
Volume 27, No. 10, Pages 7936 to 8856,
July 13 – July 27, 2012

FCC Record

A comprehensive compilation of decisions,
reports, public notices and other documents
of the Federal Communications Commission
of the United States.







FEDERAL COMMUNICATIONS COMMISSION

Julius Genachowski, Chairman
Robert M. McDowell
Mignon Clyburn
Jessica Rosenworcel
Ajit V. Pai

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	File No.: EB-10-SE-132
)	
Stratos Offshore Services Company, an	)	Acct. No.: 201232100031
indirect, wholly-owned subsidiary of)	
Inmarsat plc	)	FRN: 0002147353

ORDER

Adopted: July 13, 2012**Released: July 13, 2012**

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) and Stratos Offshore Services Company, an indirect, wholly-owned subsidiary of Inmarsat plc (SOSCO). The Consent Decree resolves and terminates the Bureau's investigation into SOSCO's compliance with Section 301 of the Communications Act of 1934, as amended (Act),¹ and Section 1.903(a) of the Commission's rules (Rules),² pertaining to the apparent operation of certain Wireless Communications Service fixed base transmitters from locations outside of their authorized service areas.

2. The Bureau and SOSCO have negotiated a Consent Decree that resolves this matter. A copy of the Consent Decree is attached hereto and incorporated herein by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether SOSCO possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Act,³ and Sections 0.111 and 0.311 of the Rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 1.903(a).

³ 47 U.S.C. § 154(i).

⁴ 47 C.F.R. §§ 0.111, 0.311.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Bruce Henoch, Vice President and General Counsel, Stratos Offshore Services Company, 6550 Rock Spring Drive, Suite 650, Bethesda, MD 20817, as well as to Christine M. Crowe, Esq., counsel for Stratos Offshore Services Company, Wilkinson Barker Knauer, LLP, 2300 N Street, N.W., Suite 700, Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
	)	File No.: EB-10-SE-132
Stratos Offshore Services Company, an)	
indirect, wholly-owned subsidiary of	)	Acct. No.: 201232100031
Inmarsat plc)	
	)	FRN: 0002147353
)	

CONSENT DECREE

The Enforcement Bureau of the Federal Communications Commission and Stratos Offshore Services Company, by their respective authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau's investigation into possible violations of Section 301 of the Communications Act of 1934, as amended,¹ and Section 1.903(a) of the Commission's rules,² with respect to the apparent unauthorized operation of certain Wireless Communications Service fixed base transmitters from locations outside of their authorized service area in the Gulf of Mexico.

I. DEFINITIONS

- I. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*
 - (b) "Adopting Order" means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) "Communications Laws" means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Stratos is subject by virtue of its business activities, including but not limited to, the Licensing Rules.

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 1.903(a).

- (f) “Compliance Plan” means the compliance obligations, program, and procedures described in this Consent Decree at paragraph 9.
- (g) “Covered Employees” means all employees and agents of SOSCO who perform duties, or supervise, oversee, or manage the performance of duties that relate to SOSCO’s responsibilities under the Licensing Rules.
- (h) “Effective Date” means the date on which the Bureau releases the Adopting Order.
- (i) “Investigation” means the investigation commenced by the Bureau into SOSCO’s apparent violations of the Licensing Rules, pursuant to a referral from the Wireless Telecommunications Bureau in August of 2010 regarding the apparent unauthorized operation of stations KNLB212, KNLB319, KNLB320, and KNLB321.
- (j) “Licensing Rules” means Section 301 of the Act and Section 1.903(a) of the Rules, and other Communications Laws that prohibit the use or operation of a wireless radio station without a valid Commission authorization or in a manner inconsistent with such authorization.
- (k) “Operating Procedures” means the standard, internal operating procedures and compliance policies established by SOSCO to implement the Compliance Plan.
- (l) “Parties” means SOSCO and the Bureau, each of which is a “Party.”
- (m) “SOSCO” means Stratos Offshore Services Company, an indirect, wholly-owned subsidiary of Inmarsat plc, its predecessors-in-interest and successors-in-interest.
- (n) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

2. Section 301 of the Act³ and Section 1.903(a) of the Rules⁴ prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by wireless radio stations except under and in accordance with an authorization granted by the Commission.

³ 47 U.S.C. § 301.

⁴ 47 C.F.R. § 1.903(a).

3. SOSCO holds licenses for the operation of 2.3 GHz Wireless Communications Service systems with the following call signs: (1) KNLB212, (2) KNLB319, (3) KNLB320, and (4) KNLB321.⁵ These licenses permit SOSCO to deploy facilities within the Gulf of Mexico service area, which "extends from 12 nautical miles off the U.S. Gulf coast outward into the Gulf."⁶ In the fall of 2009, SOSCO discovered that certain of its fixed base transmitters were operating within 12 nautical miles of the U.S. Gulf Coast without valid Commission authorization. SOSCO thereafter contacted each of the licensees in those coastal areas to seek their consent to SOSCO requesting Special Temporary Authority (STA) from the Commission to continue to operate those transmitters on a temporary basis. Shortly after securing the consents of those coastal area licensees, on February 22, 2010, SOSCO voluntarily disclosed the unauthorized operation, filing a request for STA with the Wireless Telecommunications Bureau (WTB) seeking to operate the unauthorized fixed base transmitters for a period of 180 days.⁷ After granting the STA on July 9, 2010, WTB referred this matter to the Bureau on August 11, 2010 for investigation and possible enforcement action. The Bureau and SOSCO entered into tolling agreements to toll the statute of limitations.⁸

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

5. **Jurisdiction.** SOSCO agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and that the Bureau has the authority to enter into and adopt this Consent Decree.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation. In consideration for the termination of the Investigation, SOSCO agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent

⁵ See File No. 0000057349.

⁶ 47 C.F.R. § 27.6(a)(2).

⁷ See File No. 0004135160 (filed Feb. 22, 2010, amended June 1, 2010 and June 21, 2010, granted July 9, 2010); Special Temporary Authorizations, call signs WQMD892, WQMD893, WQMD894, WQMD895, and WQMD896.

⁸ See, e.g., Tolling Agreement Extension, File No. EB-10-SE-132, executed by and between John D. Poulasse, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, and Bruce Henoch, General Counsel, Stratos Offshore Services Company (Mar. 30, 2012).

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Decree, to institute on its own motion any new proceeding, formal or informal, or take any action on its own motion against SOSCO concerning the matters that were the subject of the Investigation. The Bureau also agrees that in the absence of new material evidence it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against SOSCO with respect to SOSCO's basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission licenses or authorizations.

8. **Compliance Officer.** Within thirty (30) calendar days after the Effective Date, SOSCO shall designate a senior corporate manager with the requisite corporate and organizational authority to serve as Compliance Officer and to discharge the duties set forth below. The Compliance Officer shall be responsible for developing, implementing, and administering the Compliance Plan and ensuring that SOSCO complies with the terms and conditions of the Compliance Plan and this Consent Decree. In addition to the general knowledge of the Communications Laws necessary to discharge his/her duties under this Consent Decree, the Compliance Officer shall have specific knowledge of the Licensing Rules prior to assuming his/her duties.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, SOSCO agrees that it shall within sixty (60) calendar days after the Effective Date, develop and implement a Compliance Plan designed to ensure future compliance with the Communications Laws and with the terms and conditions of this Consent Decree. With respect to the Licensing Rules, SOSCO shall implement the following procedures:

- (a) **Operating Procedures on Licensing Rules.** Within sixty (60) calendar days after the Effective Date, SOSCO shall establish Operating Procedures that all Covered Employees must follow to help ensure SOSCO's compliance with the Licensing Rules. SOSCO's Operating Procedures shall include internal procedures and policies specifically designed to ensure that SOSCO obtains any required Commission authorizations prior to commencing operations on any frequencies and that SOSCO's operations on such frequencies are consistent with such Commission authorizations.
- (b) **Compliance Manual.** Within sixty (60) calendar days after the Effective Date, the Compliance Officer shall develop and distribute a Compliance Manual to all Covered Employees. The Compliance Manual shall explain the Licensing Rules and set forth the Operating Procedures that Covered Employees shall follow to help ensure SOSCO's compliance with the Licensing Rules. SOSCO shall periodically review and revise the Compliance Manual as necessary to ensure that the information set forth therein remains current and complete. SOSCO shall distribute any revisions to the Compliance Manual promptly to all Covered Employees.
- (c) **Compliance Training Program.** SOSCO shall establish and implement a Compliance Training Program on compliance with the Licensing Rules and the Operating Procedures. As part of the Compliance Training Program, Covered Employees shall be advised of SOSCO's obligation to report any noncompliance with the Licensing Rules under paragraph 10

of this Consent Decree and shall be instructed on how to disclose noncompliance to the Compliance Officer. All Covered Employees shall be trained pursuant to the Compliance Training Program within sixty (60) calendar days after the Effective Date, except that any person who becomes a Covered Employee at any time after the Effective Date shall be trained within thirty (30) calendar days after the date such person becomes a Covered Employee. SOSCO shall repeat the compliance training on an annual basis and shall periodically review and revise the Compliance Training Program as necessary to ensure that it remains current and complete and to enhance its effectiveness.

10. **Reporting Noncompliance.** SOSCO shall report any noncompliance with the Licensing Rules and with the terms and conditions of this Consent Decree within fifteen (15) calendar days after the discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of noncompliance; (ii) the steps that SOSCO has taken or will take to remedy such noncompliance; (iii) the schedule on which such remedial actions will be taken; and (iv) the steps that SOSCO has taken or will take to prevent the recurrence of any such noncompliance. All such reports of noncompliance shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-C366, Washington, D.C. 20554, with a copy submitted electronically to Jennifer Burton at Jennifer.Burton@fcc.gov and JoAnn Lucanik at JoAnn.Lucanik@fcc.gov.

11. **Compliance Reports.** SOSCO shall file Compliance Reports with the Commission ninety (90) calendar days after the Effective Date, twelve (12) months after the Effective Date, and twenty-four (24) months after the Effective Date.

- (a) Each compliance report shall include a detailed description of SOSCO's efforts during the relevant period to comply with the terms and conditions of this Consent Decree and the Licensing Rules. In addition, each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of SOSCO, stating that the Compliance Officer has personal knowledge that SOSCO (i) has established and implemented the Compliance Plan; (ii) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (iii) is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 10 hereof.
- (b) The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and must comply with Section 1.16 of the Rules⁹ and be subscribed to as true under penalty of perjury in substantially the form set forth therein.
- (c) If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of SOSCO, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully (i) each instance of noncompliance; (ii) the steps that SOSCO has taken or will take to remedy such noncompliance, including

⁹ 47 C.F.R. § 1.16.

the schedule on which proposed remedial actions will be taken; and (iii) the steps that SOSCO has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken.

- (d) All Compliance Reports shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-C366, Washington, D.C. 20554, with a copy submitted electronically to Jennifer Burton at Jennifer.Burton@fcc.gov and to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov.

12. **Termination Date.** Unless stated otherwise, the obligations set forth in paragraphs 8 through 11 of this Consent Decree shall expire twenty-four (24) months after the Effective Date.

13. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to Section 208 of the Act against SOSCO or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaints will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by SOSCO with the Communications Laws.

14. **Voluntary Contribution.** SOSCO agrees that it will make a voluntary contribution to the United States Treasury in the amount of Seventy-Five Thousand Dollars (\$75,000) within thirty (30) calendar days after the Effective Date. SOSCO shall also send electronic notification of payment to Jennifer Burton at Jennifer.Burton@fcc.gov, JoAnn Lucanik at JoAnn.Lucanik@fcc.gov and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the

credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e mail, ARINQUIRIES@fcc.gov.

15. **Waivers.** SOSCO waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order as defined herein. SOSCO shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither SOSCO nor the Commission shall contest the validity of the Consent Decree or of the Adopting Order, and SOSCO shall waive any statutory right to a trial *de novo*. SOSCO hereby agrees to waive any claims it may have under the Equal Access to Justice Act,¹⁰ relating to the matters addressed in this Consent Decree.

16. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

17. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which SOSCO does not expressly consent), that provision will be superseded by such Rule or Commission order.

18. **Successors and Assigns.** SOSCO agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

19. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the Communications Laws.

20. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

21. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

22. **Authorized Representative.** The individual signing this Consent Decree on behalf of SOSCO represents and warrants that he is authorized by SOSCO to execute this Consent Decree and to bind SOSCO to the obligations set forth herein. The FCC signatory

¹⁰ Equal Access to Justice Act, Pub L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504); see also 47 C.F.R. §§ 1.1501-1.1530.

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represents that she is signing this Consent Decree in her official capacity and that she is authorized to execute this Consent Decree.

23. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

P. Michele Ellison
Chief
Enforcement Bureau

Date

Bruce Henoeh
Vice President and General Counsel
Stratos Offshore Services Company

Date

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) File No.: EB-10-SE-018
)
) Acct. No.: 201232100029
Elgato Systems LLC)
) FRN: 0021841176

ORDER

Adopted: July 12, 2012

Released: July 13, 2012

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) and Elgato Systems LLC (Elgato). The Consent Decree resolves and terminates the Bureau's investigation into Elgato's compliance with Section 302(b) of the Communications Act of 1934, as amended (Act),¹ and Sections 2.803 and 15.19 of the Commission's rules (Rules)² pertaining to the marketing of television broadcast receivers.
2. The Bureau and Elgato have negotiated the Consent Decree that resolves this matter. A copy of the Consent Decree is attached hereto and incorporated herein by reference.
3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.
4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether Elgato possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.
5. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Act,³ and Sections 0.111 and 0.311 of the Rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. §§ 2.803, 15.19.

³ 47 U.S.C. § 154(i).

⁴ 47 C.F.R. §§ 0.111, 0.311.

THE OFFICE OF THE
ATTORNEY GENERAL
MONTELEONE, MISSISSIPPI

6. **IT IS FURTHER ORDERED** that the above-captioned investigation IS **TERMINATED**.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Adam Steinberg, Vice President of Marketing, Elgato Systems LLC, 900 Kearney Street, San Francisco, CA 94133, and to Jason Rademacher, Esq., counsel for Elgato Systems LLC, Dow Lohnes PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) File No.: EB-10-SE-018
)
Elgato Systems LLC) Acct. No.: 201232100029
)
) FRN: 0021841176

CONSENT DECREE

The Enforcement Bureau of the Federal Communications Commission and Elgato Systems LLC, by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau's investigation into possible violations of Section 302(b) of the Communications Act of 1934, as amended,¹ and Sections 2.803 and 15.19 of the Commission's rules² pertaining to the marketing of a television broadcast receiver model.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
- (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) "Adopting Order" means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Communications Laws" means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Elgato is subject by virtue of its business activities, including but not limited to, the Equipment Marketing Rules.
 - (e) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (f) "Compliance Plan" means the compliance obligations, programs and procedures described in this Consent Decree at paragraph 9.
 - (g) "Covered Employees" means all employees and agents of Elgato who perform, or supervise, oversee, or manage the performance of, duties that relate to Elgato's responsibilities under the Equipment Marketing Rules.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. §§ 2.803, 15.19.

- (h) “Effective Date” means the date on which the Bureau releases the Adopting Order.
- (i) “Elgato” means Elgato Systems LLC, and its predecessors-in-interest and successors-in-interest.
- (j) “Equipment Marketing Rules” means Section 302(b) of the Act³ and Sections 2.803 and 15.19 of the Rules⁴ and other Communications Laws governing the marketing of radio frequency devices within the United States and its territories.
- (k) “Investigation” means the investigation described in the Bureau’s March 18, 2010 letter of inquiry⁵ regarding whether the marketing of certain digital television receivers by Elgato complies with Section 2.803 and Part 15 of the Commission’s Rules.
- (l) “Operating Procedures” means the standard, internal operating procedures and compliance policies established by Elgato to implement the Compliance Plan.
- (m) “Parties” means Elgato and the Bureau, each of which is a “Party.”
- (n) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

2. Pursuant to Section 302(b) of the Act⁶ and Section 2.803 of the Rules,⁷ certain unintentional radiators⁸ may not be marketed⁹ in the United States unless the devices comply with the applicable technical standards as well as the administrative requirements relating to equipment labeling and consumer disclosure. Elgato markets a broadcast television receiver,¹⁰ the EyeTV One television tuner model, that is designed to connect directly to a television antenna and/or an incoming cable line and to a network router or computer for the purpose of delivering digital television to the monitor of a personal computer. As an unintentional radiator, this device is subject to authorization via the Commission’s equipment verification procedures.¹¹ Devices subject to the verification procedures must,

³ 47 U.S.C. § 302a(b).

⁴ 47 C.F.R. §§ 2.803, 15.19.

⁵ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, to Adam Steinberg, Director, Product Line Management, Elgato Systems LLC (Mar. 18, 2010) (on file in EB-10-SE-018).

⁶ 47 U.S.C. § 302a(b).

⁷ 47 C.F.R. § 2.803.

⁸ Section 15.3(z) of the Rules defines an “unintentional radiator” as a “device that intentionally generates radio frequency energy for use within the device, or that sends radio frequency signals by conduction to associated equipment via connecting wiring, but which is not intended to emit RF energy by radiation or induction.” *Id.* § 15.3(z).

⁹ Section 2.803(e)(4) of the Rules defines “marketing” as the “sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease.” *Id.* § 2.803(e)(4).

¹⁰ *Id.* § 15.3(w) (defining a television broadcast receiver as a “device designed to receive television pictures that are broadcast simultaneously with sound on the television channels authorized under part 73 of this chapter”).

¹¹ *Id.* § 15.101.

among other requirements, be labeled in accordance with Section 15.19 of the Rules.¹² Under Section 15.19(a)(1) of the Rules,¹³ receivers operating in the broadcast services must be labeled, in a conspicuous location, with the following statement: “This device complies with part 15 of the FCC Rules. Operation is subject to the condition that this device does not cause harmful interference.”¹⁴ However, under Section 15.19(a)(5) of the Rules,¹⁵ when a device subject to verification is so small that it is not practicable to fully label it, it may be labeled only with a “unique identifier,”¹⁶ provided that the remaining required information is “placed in a prominent location in the instruction manual or pamphlet supplied to the user” or “on the container in which the device is marketed.”¹⁷ As the importer of the device, Elgato is responsible for the device’s compliance with the applicable technical standards and administrative requirements, including Section 15.19.¹⁸

3. On March 18, 2010, the Bureau’s Spectrum Enforcement Division issued a letter of inquiry (LOI) to Elgato,¹⁹ directing the company to submit a sworn written response to a series of questions relating to Elgato’s manufacture, importation, and marketing of digital television receivers. Elgato responded to the LOI on April 19, 2010 (LOI Response).²⁰ In its LOI Response, Elgato reported that it imports and markets only one digital television receiver, the EyeTV One television tuner model, and provided documentation demonstrating that the model had been properly verified before marketing.²¹ Elgato also provided photographs demonstrating that the model is smaller than the palm of a hand and that the label affixed to the model displayed a unique identifier.²² Elgato acknowledged that the EyeTV One television tuner model devices did not include the remaining information required by Section 15.19(a)(1), either on the label, or in the instruction manual or on the container in which the device was sold.²³ However, Elgato reported that, as of the date of its LOI Response, it had taken specific remedial measures, including labeling the EyeTV One television tuner model devices in accordance with Section 15.19(a)(5), updating the online instruction manual, and also posting on its website a frequently asked

¹² *Id.* § 15.19.

¹³ *Id.* § 15.19(a)(1).

¹⁴ *Id.*

¹⁵ *Id.* § 15.19(a)(5); *see also id.* § 2.954 (stating that “[d]evices subject to verification shall be uniquely identified by the person responsible for marketing or importing the equipment within the United States. However, the identification shall not be of a format which could be confused with the FCC Identification required on certified, notified or type accepted equipment. The importer or manufacturer shall maintain adequate identification records to facilitate positive identification for each verified device.”).

¹⁶ 47 C.F.R. § 15.19(a)(5); *see also id.* § 2.954 (requiring that devices subject only to verification be “uniquely identified”).

¹⁷ 47 C.F.R. § 15.19(a)(5).

¹⁸ *See id.* § 2.909(b) (defining the “responsible party” for equipment subject to verification as the equipment manufacturer, the importer, or if the device is modified by any party not working under the authority of the responsible party, the party performing the modification).

¹⁹ *See supra* note 5.

²⁰ *See* Letter from Adam Steinberg, Vice President of Marketing, Elgato Systems LLC, to Nissa Laughner, Attorney Advisor, Spectrum Enforcement Division, FCC Enforcement Bureau (Apr. 19, 2010) (on file in EB-10-SE-018).

²¹ *Id.* at 10 and Exhibit 3.

²² *Id.* at 11-12.

²³ *Id.* at 12.

question that included the information required by Section 15.19(a).²⁴ The Bureau and Elgato executed tolling agreements to toll the statute of limitations.²⁵

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

5. **Jurisdiction.** Elgato agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and that the Bureau has the authority to enter into and adopt this Consent Decree.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation. In consideration for the termination of the Investigation, Elgato agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any new proceeding, formal or informal, or take any action on its own motion against Elgato concerning the matters that were the subject of the Investigation. The Bureau also agrees that in the absence of new material evidence it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Elgato with respect to Elgato's basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission licenses or authorizations.

8. **Compliance Officer.** Within thirty (30) calendar days after the Effective Date, Elgato shall designate a senior corporate manager with the requisite corporate and organizational authority to serve as Compliance Officer and to discharge the duties set forth below. The person designated as the Compliance Officer shall be responsible for developing, implementing, and administering the Compliance Plan and ensuring that Elgato complies with the terms and conditions of the Compliance Plan and this Consent Decree. In addition to the general knowledge of the Communications Laws necessary to discharge his/her duties under this Consent Decree, the Compliance Officer shall have specific knowledge of the Equipment Marketing Rules prior to assuming his/her duties.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, Elgato agrees that it shall within sixty (60) calendar days after the Effective Date, develop and implement a Compliance Plan designed to ensure future compliance with the Communications Laws and with the terms and

²⁴ *Id.* at 12.

²⁵ See, e.g., Tolling Agreement Extension, File No. EB-10-SE-018, executed by and between Ricardo M. Durham, Senior Deputy Division Chief, on behalf of John D. Poutasse, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, and Adam Steinberg, Vice President of Marketing, Elgato Systems LLC (Apr. 9, 2012).

conditions of this Consent Decree. With respect to the Equipment Marketing Rules, Elgato shall implement the following procedures:

- (a) **Operating Procedures on Equipment Marketing.** Within sixty (60) calendar days after the Effective Date, Elgato shall establish Operating Procedures that all Covered Employees must follow to help ensure Elgato's compliance with the Equipment Marketing Rules. Elgato's Operating Procedures shall include internal procedures and policies specifically designed to ensure that all television broadcast receivers and other radio frequency devices marketed by Elgato have been properly authorized (via the certification, verification, or declaration of conformity procedures, as applicable), comply with applicable technical standards, and comply with the applicable administrative requirements relating to equipment labeling and consumer disclosure.
- (b) **Compliance Manual.** Within sixty (60) calendar days after the Effective Date, the Compliance Officer shall develop and distribute a Compliance Manual to all Covered Employees. The Compliance Manual shall explain the Equipment Marketing Rules and set forth the Operating Procedures that Covered Employees shall follow to help ensure Elgato's compliance with the Equipment Marketing Rules. Elgato shall periodically review and revise the Compliance Manual as necessary to ensure that the information set forth therein remains current and complete. Elgato shall distribute any revisions to the Compliance Manual promptly to all Covered Employees.
- (c) **Compliance Training Program.** Elgato shall establish and implement a Compliance Training Program on compliance with the Equipment Marketing Rules and the Operating Procedures. As part of the Compliance Training Program, Covered Employees shall be advised of Elgato's obligation to report any noncompliance with the Equipment Marketing Rules under paragraph 10 of this Consent Decree and shall be instructed on how to disclose noncompliance to the Compliance Officer. All Covered Employees shall be trained pursuant to the Compliance Training Program within sixty (60) calendar days after the Effective Date, except that any person who becomes a Covered Employee at any time after the Effective Date shall be trained within thirty (30) calendar days after the date such person becomes a Covered Employee. Elgato shall repeat the compliance training on an annual basis and shall periodically review and revise the Compliance Training Program as necessary to ensure that it remains current and complete and to enhance its effectiveness.
- (d) **Remedial Measures.** Elgato agrees to prominently display and maintain a link on its website that provides consumers the information required by Section 15.19(a) of the Rules.

10. **Reporting Noncompliance.** Elgato shall report any noncompliance with the Equipment Marketing Rules and with the terms and conditions of this Consent Decree within fifteen (15) calendar days after discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of noncompliance; (ii) the steps that Elgato has taken or will take to remedy such noncompliance; (iii) the schedule on which such remedial actions will be taken; and (iv) the steps that Elgato has taken or will take to prevent the recurrence of any such noncompliance. All reports of noncompliance shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, Room 3-C366, 445 12th Street, S.W. Washington, D.C. 20554,

with a copy submitted electronically to Nissa Laughner at Nissa.Laughner@fcc.gov and to Ricardo Durham at Ricardo.Durham@fcc.gov.

11. **Compliance Reports.** Elgato shall file Compliance Reports with the Commission ninety (90) calendar days after the Effective Date, twelve (12) months after the Effective Date, and twenty-four (24) months after the Effective Date.

- (a) Each compliance report shall include a detailed description of Elgato's efforts during the relevant period to comply with the terms and conditions of this Consent Decree and the Equipment Marketing Rules. In addition, each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of Elgato, stating that the Compliance Officer has personal knowledge that Elgato (i) has established and implemented the Compliance Plan; (ii) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (iii) is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 10 hereof.
- (b) The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and must comply with Section 1.16 of the Rules²⁶ and be subscribed to as true under penalty of perjury in substantially the form set forth therein.
- (c) If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of Elgato, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully (i) each instance of noncompliance; (ii) the steps that Elgato has taken or will take to remedy such noncompliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that Elgato has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken.
- (d) All Compliance Reports shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, with a copy submitted electronically to Nissa.Laughner@fcc.gov and to Ricardo Durham at Ricardo.Durham@fcc.gov.

12. **Termination Date.** Unless stated otherwise, the requirements of paragraphs 8 through 11 of this Consent Decree shall expire twenty-four (24) months after the Effective Date.

13. **Voluntary Contribution.** Elgato agrees that it will make a voluntary contribution to the United States Treasury in the amount of two thousand eight hundred dollars (\$2,800) within thirty (30) calendar days after the Effective Date. Elgato shall also send electronic notification of payment to Nissa Laughner at Nissa.Laughner@fcc.gov, Ricardo Durham at Ricardo.Durham@fcc.gov, and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁷ When completing the FCC Form 159, enter the Account Number in block number

²⁶ 47 C.F.R. § 1.16.

²⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

14. **Waivers.** Elgato waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order as defined herein. Elgato shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Elgato nor the Commission shall contest the validity of the Consent Decree or of the Adopting Order, and Elgato shall waive any statutory right to a trial *de novo*. Elgato hereby agrees to waive any claims it may have under the Equal Access to Justice Act,²⁸ relating to the matters addressed in this Consent Decree.

15. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

16. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which Elgato does not expressly consent) that provision will be superseded by such Rule or Commission order.

17. **Successors and Assigns.** Elgato agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

18. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal

²⁸ Equal Access to Justice Act, Pub L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504); *see also* 47 C.F.R. §§ 1.1501-1.1530.

finding or determination regarding any compliance or noncompliance with the requirements of the Communications Laws.

19. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

20. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

21. **Authorized Representative.** The individual signing this Consent Decree on behalf of Elgato represents and warrants that he is authorized by Elgato to execute this Consent Decree and to bind Elgato to the obligations set forth herein. The FCC signatory represents that he is signing this Consent Decree in his official capacity and that he is authorized to execute this Consent Decree.

22. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

John D. Poutasse
Chief
Spectrum Enforcement Division
Enforcement Bureau

Date

Adam Steinberg
Vice President of Marketing
Elgato Systems LLC

Date

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Damian Anthony Ojouku Allen	)	File No.: EB-FIELDSCR-12-00001027
	)	NAL/Acct. No.: 201232600013
Pompano Beach, FL	)	FRN: 0021896410
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 16, 2012

Released: July 16, 2012

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Damian Anthony Ojouku Allen apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating an unlicensed radio transmitter on the frequency 101.1 MHz in Pompano Beach, Florida. We conclude that Mr. Allen is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000).

II. BACKGROUND

2. On October 20, 2011 and February 27, 2012, agents from the Enforcement Bureau's Miami Office (Miami Office) used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 101.1 MHz to an FM transmitting antenna mounted on an antenna structure at a commercial property in Pompano Beach, Florida. On both dates, the agents heard the station engaged in live broadcasts. Specifically, during the October 20, 2011 investigation, the agents heard a live disc jockey (DJ), self-identified as DJ "Mikey Mike," promote an event called the "Mikey Mike Birthday Splash." The agents determined that the signals on 101.1 MHz exceeded the limits for operation under Part 15 of the Commission's rules (Rules),² and therefore required a license. Commission records showed no authorization was issued to Mr. Allen or to anyone else for operation of an FM broadcast station at or near this address.

3. On February 27, 2012, agents from the Miami Office, accompanied by the commercial property owner, observed radio transmitting equipment, including a power amplifier, which was connected via coaxial cable to an FM transmitting antenna that was installed in a storage room. The property owner told the agents that he rented the storage space to two men named "Damian" and "Mike," and then retrieved the renters' contact phone number, which he then dialed. An agent spoke by phone to

¹ 47 U.S.C. § 301.

² Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

an individual, whom the property owner identified as “Mike.”³ During the phone conversation, Mike asked the agent what would happen to the radio equipment. Shortly after the telephone conversation ended, it appeared to the agents that Mike must have immediately contacted Mr. Allen about the radio equipment, since Mr. Allen showed up at the station, told the agents that the transmission equipment was his, and then removed the equipment from the location.

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁴ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁵ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁶ and the Commission has so interpreted the term in the Section 503(b) context.⁷ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁸ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁹

A. Unlicensed Broadcast Operations

5. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.¹⁰ For the purposes of Section 301, the word “operate” has been interpreted to mean both the technical operation of the station, as well as “the general conduct or management of a station as a whole, as distinct from the specific

³ The Enforcement Bureau has taken separate action against Michael William Downer. See *Michael William Downer*, EB-FIELDSCR-12-00001027, Notice of Apparent Liability for Forfeiture, DA 12-1094 (Enf. Bur. July 16, 2012).

⁴ 47 U.S.C. § 503(b).

⁵ 47 U.S.C. § 312(f)(1).

⁶ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁷ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁸ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁹ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹⁰ 47 U.S.C. § 301.

technical work involved in the actual transmission of signals.”¹¹ In other words, the use of the word “operate” in Section 301 captures not just the “actual, mechanical manipulation of radio apparatus,”¹² but also operation of a radio station generally.¹³ To determine whether an individual is involved in the general conduct or management of the station, we can consider whether such individual exercises control over the station, which the Commission has defined to include “. . . any means of actual working control over the operation of the [station] in whatever manner exercised.”¹⁴

6. We find that the record evidence in this case is sufficient to establish that Mr. Allen violated Section 301 of the Act. On October 20, 2011 and February 27, 2012, agents from the Miami Office determined that an unlicensed radio station on the frequency 101.1 MHz operated from a commercial building in Pompano Beach, Florida. During both dates, the agents heard the station engaged in live broadcasts. A review of the Commission’s records revealed that no license or authorization was issued to anyone to operate a radio station on 101.1 MHz at this location. Under Section 301, Mr. Allen can be said to have “operated” the unlicensed radio station on 101.1 MHz because the evidence shows that Mr. Allen exercised control over the general conduct or management of the station. According to the commercial building owner, Mr. Allen and another individual (i.e., Michael William Downer, aka DJ “Mikey Mike”) were leasing space in the building that housed the station, and the rented space appeared to the agents to be used primarily for the purpose of operating the unlicensed station. In addition, on February 27, 2012, Mr. Allen admitted to the agents that he owned the transmitting equipment, and then personally disconnected and removed the equipment from the location. The foregoing facts indicate that Mr. Allen consciously operated and/or otherwise was involved in the general conduct or management of the unauthorized station and did so on more than one day. We therefore conclude, based on the evidence before us, that Mr. Allen apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.¹⁵

¹¹ See *Campbell v. United States*, 167 F.2d 451, 453 (5th Cir. 1948) (comparing the use of the words “operate” and “operation” in Sections 301, 307, and 318 of the Act, and concluding that the word “operate” as used in Section 301 of the Act means both the technical operation of the station as well as the general conduct or management of the station).

¹² *Id.*

¹³ *Id.* See also 47 U.S.C. § 307(c)(1).

¹⁴ See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9747 (1995), *recons. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

¹⁵ The fact that someone else in addition to Mr. Allen may have been involved in the station’s operations does not make Mr. Allen any less of a participant in the station’s unlicensed operations. We have previously held that, because Section 301 of the Act provides that “no person shall use or operate” radio transmission equipment, the liability for unlicensed operation may be assigned to any individual taking part in the operation of the unlicensed station, regardless of who else may be responsible for the operation. 47 U.S.C. § 301 (emphasis added); see, e.g., *Jean L. Senatus*, Forfeiture Order, 20 FCC Rcd 14418, at para. 11 (Enf. Bur. 2005); *Robert Brown*, EB-10-BS-0050, Memorandum Opinion and Order, DA 12-929, 2012 WL 2391969 (Enf. Bur. June 22, 2012), *aff’g*, Forfeiture Order, 26 FCC Rcd 6854 (Enf. Bur. 2011), *aff’g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13740 (Enf. Bur. 2010); *Lloyd Morris*, EB-09-BS-0046, Memorandum Opinion and Order, DA 12-930, 2012 WL 2391973 (Enf. Bur. June 22, 2012), *aff’g*, Forfeiture Order, 26 FCC Rcd 6856 (Enf. Bur. 2011), *aff’g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13736 (Enf. Bur. 2010).

B. Proposed Forfeiture Amount

7. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁶ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁷ In doing so, we find that the violations here warrant a proposed forfeiture above the base amount. Commission records show that the Miami Office previously issued several *Notices of Unlicensed Operation* to Mr. Allen for operation of unlicensed stations on 102.1 MHz at other locations in Florida.¹⁸ The fact that Mr. Allen continued to operate an unlicensed station after being put on notice multiple times that his unlicensed operation of a radio station contravened the Act, the Commission's rules, and related Commission orders demonstrates a deliberate disregard for the Commission's requirements. Thus, we find that an additional upward adjustment of \$10,000 in the forfeiture amount is warranted.¹⁹ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Allen is apparently liable for a forfeiture in the amount of \$20,000.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Damian Anthony Ojouku Allen is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for violations of Section 301 of the Act.²⁰

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Damian Anthony Ojouku Allen **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Damian Anthony Ojouku Allen will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance

¹⁶ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁷ 47 U.S.C. § 503(b)(2)(E).

¹⁸ See *Damian Anthony Ojouku Allen*, Notice of Unlicensed Operation (Enf. Bur. June 2, 2010) (on file in EB-10-MA-0088); *Damian Anthony Ojouku Allen and Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. May 21, 2010) (on file in EB-10-MA-0088); *Damien Allen and Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. July 1, 2010) (on file in EB-10-MA-0123).

¹⁹ See, e.g., *Whisler Fleurinor*, Forfeiture Order, 26 FCC Rcd 14437 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 2478 (Enf. Bur. 2011) (imposing a \$20,000 forfeiture for violations of Section 301); *Nounone Lubin*, Forfeiture Order, 26 FCC Rcd 7758 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 12654 (Enf. Bur. 2010) (imposing a \$20,000 forfeiture for violations of Section 301).

²⁰ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

Advice) must be submitted.²¹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²² If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²³ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617, and include the NAL/Acct. No. referenced in the caption. Damian Anthony Ojouku Allen also shall e-mail the written response to SCR-Response@fcc.gov.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

²¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/Form159.pdf>.

²² See 47 C.F.R. § 1.1914.

²³ 47 C.F.R. §§ 1.16, 1.80(f)(3).

14. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Damian Anthony Ojouku Allen at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Steven DeSena
Resident Agent
Miami Office
South Central Region
Enforcement Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Michael William Downer) File No.: EB-FIELDSCR-12-00001027
) NAL/Acct. No.: 201232600012
Pompano Beach, FL) FRN: 0021896352
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 16, 2012

Released: July 16, 2012

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Michael William Downer apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating an unlicensed radio transmitter on the frequency 101.1 MHz in Pompano Beach, Florida. We conclude that Mr. Downer is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000).

II. BACKGROUND

2. On October 20, 2011 and February 27, 2012, agents from the Enforcement Bureau's Miami Office (Miami Office) used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 101.1 MHz to an FM transmitting antenna mounted on an antenna structure at a commercial property in Pompano Beach, Florida. On both dates, the agents heard the station identify itself on the air as "N-R-G." On October 20, 2011, the agents heard a live disc jockey (DJ), self-identified as DJ "Mikey Mike," mention "Mikey Mike Birthday Splash [Month Date]."² The agents determined that the signals on 101.1 MHz exceeded the limits for operation under Part 15 of the Commission's rules (Rules),³ and therefore required a license. Commission records showed no authorization was issued to Mr. Downer or to anyone else for operation of an FM broadcast station at or near this address.

3. On February 27, 2012, agents from the Miami Office, accompanied by the commercial property owner, observed radio transmitting equipment, including a power amplifier connected via coaxial cable to an FM transmitting antenna that was installed in a storage room. The property owner told the agents that he rented the storage space to two men, one of whom was named "Mike" and the other "Damian." The property owner had the renters' contact phone number, which he dialed, and then handed

¹ 47 U.S.C. § 301.

² Month and date redacted.

³ Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

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the phone to one of the agents. The agent spoke to an individual, whom the property owner identified as "Mike." During the phone conversation, Mike asked the agent what would happen to his radio equipment. Shortly after the telephone conversation ended, the other renter, Damian Anthony Ojouku Allen,⁴ came to the station and removed the equipment from the location.

4. Agents from the Miami Office thereafter found additional information connecting Mr. Downer to the unlicensed station on the Internet. Three associated Facebook pages, "Michael Djmikeymike Downer,"⁵ "Mikey Mike Bday Splash,"⁶ and "Nrg Wenzdaze,"⁷ each displayed an advertisement with Mr. Downer's picture⁸ for an event called the "Mikey Mike Bday Splash," which was being held on Mr. Downer's date of birth.⁹ The "Mikey Mike Bday Splash" and "Nrg Wenzdaze" webpages also referred to "nrgonlineradio.com" and "NRGONLINERADIO.COM 101.1 FM," respectively.¹⁰ The contact phone number listed on the "Mikey Mike Bday Splash" and "Nrg Wenzdaze" webpages matched a contact phone number provided by Mr. Downer and Mr. Allen on a lease agreement for a commercial suite in Lauderhill, Florida, which housed an unlicensed radio station operating on the frequency 102.1 MHz; the agents obtained a copy of the agreement during a 2010 investigation.¹¹

III. DISCUSSION

5. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹² Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section

⁴ The Enforcement Bureau has taken separate action against Damian Anthony Ojouku Allen. See *Damian Anthony Ojouku Allen*, File No. EB-FIELDSCR-12-00001027, Notice of Apparent Liability for Forfeiture, DA 12-1093 (Enf. Bur. July 16, 2012).

⁵ See Facebook page, <http://www.facebook.com/people/Michael-Djmikeymike-Downer/100000739519126> (last visited June 12, 2012).

⁶ See Facebook page, <http://www.facebook.com/events/297829443562732/> (last visited Feb. 29, 2012).

⁷ See Facebook page, <http://www.facebook.com/nrg.wenzdaze> (last visited Feb. 29, 2012).

⁸ Agents from the Miami Office obtained a picture of Mr. Downer from the Florida Department of Highway Safety and Motor Vehicles.

⁹ LexisNexis Investigative Portal Homepage, <http://www.lexisnexis.com/government/solutions/investigative/> (last visited Feb. 29, 2012).

¹⁰ See *supra* notes 6 and 7.

¹¹ See *Damien Allen and Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. July 1, 2010) (on file in EB-10-MA-0123).

¹² 47 U.S.C. § 503(b).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

503(b) context.¹⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹⁷

A. Unlicensed Broadcast Operations

6. The evidence in this case is sufficient to establish that Mr. Downer violated Section 301 of the Act. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.¹⁸ As the record shows, on October 20, 2011 and February 27, 2012, agents from the Miami Office determined that an unlicensed radio station was operating on the frequency 101.1 MHz from a commercial building in Pompano Beach, Florida. A review of the Commission’s records revealed that no license or authorization was issued to anyone to operate a radio station on 101.1 MHz at this location. The owner of the commercial building stated that “Mike” (i.e., Michael William Downer) and another individual (i.e., Damian Anthony Ojouku Allen) rented the space housing the unlicensed radio station. During a phone conversation, “Mike” asked the agent what would happen to his radio transmitting equipment as a result of the investigation, and then apparently made arrangements with the other renter, Mr. Allen, to remove the equipment from the location.

7. In addition, the record shows that Mr. Downer was broadcasting over the unlicensed station. On October 20, 2011, agents from the Miami Office heard a live DJ identify himself on the air as DJ “Mikey Mike” and the station as “N-R-G.” An advertisement containing Mr. Downer’s picture for an event called the “Mikey Mike Bday Splash,” which was being held on Mr. Downer’s date of birth, was listed on three social networking websites associated with “NRGOnlineRadio.”¹⁹ Further, the contact telephone number listed on two of the social networking websites matched a contact number for Mr. Downer that the Miami Office obtained during a previous investigation of Mr. Downer’s unlicensed operations in 2010.²⁰ The totality of the evidence convinces us that Mr. Downer was DJ “Mikey Mike,” and that he operated the unlicensed station. Because Mr. Downer consciously operated the station and did so on more than one day, the apparent violation of the Act was both willful and repeated. We therefore conclude, based on the evidence before us, that Mr. Downer apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.²¹

¹⁵ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Red 4387, 4388 (1991), *recons. denied*, 7 FCC Red 3454 (1992).

¹⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Red 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Red at 1362.

¹⁸ 47 U.S.C. § 301.

¹⁹ See *supra* notes 5-7.

²⁰ See *supra* note 11.

²¹ The fact that someone else in addition to Mr. Downer may have been involved in the station’s operations does not make Mr. Downer any less of a participant in the station’s unlicensed operations. We have previously held that, because Section 301 of the Act provides that “no person shall use or operate” radio transmission equipment, the liability for unlicensed operation may be assigned to any individual taking part in the operation of the unlicensed station, regardless of who else may be responsible for the operation. 47 U.S.C. § 301 (emphasis added); see, e.g., *Jean L. Senatus*, Forfeiture Order, 20 FCC Red 14418, at para. 11 (Enf. Bur. 2005); *Robert Brown*, E:B-10-BS-0050, Memorandum Opinion and Order, DA 12-929, 2012 WL 2391969 (Enf. Bur. June 22, 2012), *aff’d*, Forfeiture Order, (continued....)

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MONTHLY MEETING

B. Proposed Forfeiture Amount

8. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000.²² In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.²³ In doing so, we find that the violations here warrant a proposed forfeiture above the base amount. Commission records show that the Miami Office previously issued several *Notices of Unlicensed Operation* to Mr. Downer for operation of unlicensed stations on 102.1 MHz at other locations in Florida.²⁴ The fact that Mr. Downer continued to operate an unlicensed station after being put on notice several times that his unlicensed operation or a radio station contravened the Act, the Commission's rules, and related Commission orders demonstrate a deliberate disregard for the Commission's requirements. Thus, we find that an additional upward adjustment of \$10,000 in the forfeiture amount is warranted.²⁵ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Downer is apparently liable for a forfeiture in the amount of \$20,000. We further caution Mr. Downer that future violations may subject him to more severe enforcement action, including but not limited to larger monetary forfeitures, criminal prosecution, and the *in rem* seizure of his equipment.²⁶

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Michael William Downer is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for violations of Section 301 of the Act.²⁷

(...continued from previous page)

26 FCC Rcd 6854 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13740 (Enf. Bur. 2010); *Lloyd Morris*, EB-09-BS-0046, Memorandum Opinion and Order, DA 12-930, 2012 WL 2391973 (Enf. Bur. June 22, 2012), *aff'g*, Forfeiture Order, 26 FCC Rcd 6856 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13736 (Enf. Bur. 2010).

²² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

²³ 47 U.S.C. § 503(b)(2)(E).

²⁴ See *Michael Downer*, Notice of Unlicensed Operation (Enf. Bur., Dec. 3, 2009) (on file in EB-09-MA-0174); *Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. Mar. 26, 2010) (on file in EB-09-MA-0174); *Damian Anthony Ojouku Allen and Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. May 21, 2010) (on file in EB-10-MA-0088); *Damian Allen and Michael Downer*, Hand-delivered Notice of Unlicensed Operation (Enf. Bur. July 1, 2010) (on file in EB-10-MA-0123).

²⁵ See, e.g., *Whisler Fleurinor*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 2478 (Enf. Bur. 2011) (imposing a \$20,000 forfeiture for violations of Section 301); *Nounone Lubin*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 12654 (Enf. Bur. 2010) (imposing a \$20,000 forfeiture for violations of Section 301).

²⁶ See 47 U.S.C. §§ 401, 501, 503, 510.

²⁷ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

10. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Michael William Downer **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Michael William Downer shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁸ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.³⁰ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617, and include the NAL/Acct. No. referenced in the caption. Michael William Downer also shall e-mail the written response to SCR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some

²⁸ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁹ See 47 C.F.R. § 1.1914.

³⁰ 47 C.F.R. §§ 1.16, 1.80(f)(3).

other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Michael William Downer at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Steven DeSena
Resident Agent
Miami Office
South Central Region
Enforcement Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No.: EB-08-SE-559
)	
Hannspree North America, Inc.	)	NAL/Acct. No.: 200832100078
)	
	)	FRN: 0018065409

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 2012

Released: July 13, 2012

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, issued pursuant to Section 405 of the Communications Act of 1934, as amended (Act),¹ and Section 1.106 of the Federal Communications Commission's rules (Rules),² we grant in part and deny in part the Petition for Reconsideration (Petition)³ filed by Hannspree North America, Inc. (Hannspree). Hannspree seeks reconsideration of the *Forfeiture Order*⁴ that imposed a twelve thousand four hundred fifty dollar (\$12,450) forfeiture for Hannspree's willful and repeated violation of Section 15.117(i)(1)(iii) of the Rules in connection with its interstate shipment of television broadcast receivers that failed to include the capability to receive over-the-air DTV broadcast signals.⁵ For the reasons set forth below, the Petition is granted in part and denied in part, and we reduce the amount of the forfeiture penalty to eleven thousand eight hundred dollars (\$11,800).

II. BACKGROUND

2. In 2002, the Federal Communications Commission (Commission) adopted the "DTV tuner requirement,"⁶ which requires that all new television broadcast receivers imported into the United

¹ 47 U.S.C. § 405.

² 47 C.F.R. § 1.106.

³ On April 1, 2009, Hannspree filed a letter seeking reduction of the forfeiture. See Letter from Eric Hsu, Vice President of Operations, Hannspree North America, Inc., to Secretary, Federal Communications Commission (Apr. 1, 2009) (on file in EB-08-SE-559). Consistent with Section 405 of the Act and Section 1.106 of the Rules, we are treating this letter as a petition for reconsideration.

⁴ *Hannspree North America, Inc.*, Forfeiture Order, 24 FCC Rcd 3616 (Enf. Bur. 2009) (*Forfeiture Order*).

⁵ See 47 C.F.R. 15.117(i)(1)(iii); see also 47 C.F.R. § 15.3(w) (defining a television broadcast receiver as a "device designed to receive television pictures that are broadcast simultaneously with sound on the television channels authorized under part 73 of this chapter").

⁶ See *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978 (2002) (*DTV Review Second Report and Order*). The Commission later modified the Rules to advance the dates by which new television receivers were required to include DTV tuners. See *Requirements for Digital Television Receiving Capability*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11196 (2005) (*DTV Tuner Report and Order*);

States or shipped in interstate commerce include the capability to receive over-the-air DTV broadcast signals.⁷ The DTV tuner requirement was intended to facilitate the transition to digital television by promoting the availability of DTV reception equipment and to protect consumers by ensuring that their television receivers provide over-the-air television reception of digital signals.⁸

3. Hannspree, a subsidiary of Hannstar Display Corporation, is a California-based importer and retailer of television broadcast receivers. On July 8, 2008, the Enforcement Bureau (Bureau) issued a letter of inquiry (LOI) to Hannspree regarding the company's compliance with the DTV tuner requirement.⁹ In its August 6, 2008, response (LOI Response), Hannspree conceded, via affidavit, that certain of its receiver offerings were noncompliant; it also provided, under penalty of perjury, comprehensive business sales records of all receivers imported and shipped during the period covered by the investigation.¹⁰ After analyzing the data provided by Hannspree, the Bureau issued a *Notice of Apparent Liability for Forfeiture (NAL)* to the company, proposing a \$12,450 forfeiture for its apparent willful and repeated violation of Section 15.117(i)(1)(iii) of the Rules by shipping in interstate commerce 249 television receivers that were not equipped with the required DTV tuners.¹¹

4. Hannspree filed a response to the *NAL* on September 3, 2008 (NAL Response).¹² In its NAL Response, Hannspree requested the exclusion of noncompliant receivers that were imported *prior to* the March 1, 2007, deadline, but sold and shipped from its two California-based retail stores *after* the deadline.¹³ The *Forfeiture Order* considered Hannspree's NAL Response but found that Hannspree presented no circumstances that warranted reduction of the proposed forfeiture.¹⁴ In particular, the *Forfeiture Order* reiterated that Section 15.117(i) prohibits the importation *or* interstate shipment of noncompliant units after the applicable deadlines.¹⁵

5. In its Petition, Hannspree argues for the first time that the Bureau incorrectly calculated the number of noncompliant receivers that were subject to the forfeiture computation.¹⁶ Hannspree avers

Requirements for Digital Television Receiving Capability, Second Report and Order, 20 FCC Rcd 18607 (2005) (*DTV Tuner Second Report and Order*).

⁷ See *DTV Review Second Report and Order*, 17 FCC Rcd at 15996, para. 40. The DTV tuner requirement also applies to other television receiving equipment, such as VCRs and DVD players. See *id.*

⁸ See *id.* at 15979, para. 1. In this regard, the DTV tuner requirement ensures that the intent of the All Channel Receiver Act of 1962 (ACRA), Pub. L. No. 87-529, 76 Stat. 150, is fulfilled. The ACRA, which is codified at 47 U.S.C. § 303(s), provides the Commission with "authority to require" that all television receivers "be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting."

⁹ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, to Hannspree North America, Inc. (July 8, 2008) (on file in EB-08-SE-559).

¹⁰ See Letter from Eric Hsu, Vice President of Operations, Hannspree North America, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau (Aug. 6, 2008) (on file in EB-08-SE-559).

¹¹ See *Hannspree North America, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12902 (Enf. Bur. 2008).

¹² See Letter from Eric Hsu, Vice President of Operations, Hannspree North America, Inc., to Secretary, Federal Communications Commission (Sept. 3, 2008) (on file in EB-08-SE-559).

¹³ See *id.* at 1.

¹⁴ See *Forfeiture Order*, 24 FCC Rcd at 3620, para. 10.

¹⁵ See *id.*

¹⁶ See Petition at 1.

that it shipped interstate a total of 74 non-DTV-compliant receivers that were subject to a forfeiture penalty, rather than the 249 units stated in the *NAL*.¹⁷ Accordingly, Hannspree seeks a corresponding reduction in the forfeiture.

III. DISCUSSION

6. Under Section 1.106(c)(1) of the Rules, a petition for reconsideration that relies on facts or arguments not previously presented to the designated authority may be granted only if (1) the facts or arguments relate to events that occurred or circumstances that have changed since the last opportunity to present such matters; or (2) the petition relies on facts or arguments unknown to the petitioner until after petitioner's last opportunity to present such matters.¹⁸ Section 1.106(c)(2) of the Rules also permits grant of a petition for reconsideration that raises new facts or arguments if the designated authority determines that consideration of the new information is required to serve the public interest.¹⁹

7. In support of its Petition, Hannspree provides a new analysis of its sales records purporting to show that only 74 units are subject to a forfeiture penalty and resubmits certain business sales records. Without explanation, however, Hannspree omits a sizeable group of noncompliant receivers that it had previously disclosed.²⁰ In addition, Hannspree neither explains the figures in its analysis (or describes their origin), nor demonstrates, as required by Section 1.106(c)(1), that the new analysis relates to changed circumstances or previously unknown facts.²¹ Therefore, while Hannspree argues that the Bureau miscalculated the number of noncompliant television receivers that were subject to a forfeiture penalty, it provides little factual support to undergird its claims, and what it does offer fails to meet the procedural threshold in Section 1.106(c)(1).

8. We note, however, that the Bureau has conducted another careful review of the record and identified a small miscalculation, which, consistent with the public interest, warrants partial reconsideration and modification of the *Forfeiture Order*.²² The *NAL* determined that Hannspree shipped a total of 5,518 receivers during the relevant period, of which 249 were non-compliant.²³ We now

¹⁷ See *id.* at 2.

¹⁸ See 47 C.F.R. § 1.106(c)(1).

¹⁹ See *id.* § 1.106(c)(2).

²⁰ See LOI Response at Exhibit A. Specifically, the business sales records that Hannspree submitted with its Petition exclude one attachment that details shipment of over 400 television receivers during the period covered by the investigation. Hannspree does not argue in its Petition that the 400 receivers that it had previously disclosed were improperly considered in connection with the *NAL*. Therefore, the Bureau again considers those receivers in its evaluation here.

²¹ See 47 C.F.R. § 1.106(c)(1).

²² See *id.* § 1.106(c)(2); see also *EZ Sacramento, Inc.*, 15 FCC Rcd 18257 (Enf. Bur. 2000) (citing *WITZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965)).

²³ *NAL*, 23 FCC Rcd at 12907, para. 15 & n.17. To determine the number of receiver units subject to forfeiture penalty, the *NAL* analysis excluded the following categories of receivers: compliant receivers; receivers that were exported; noncompliant receivers that were shipped interstate more than one year prior to the date on which the *NAL* was issued; and receivers with diagonal screen sizes measuring less than 13 inches that were shipped interstate prior to the effective date for such receivers. See *id.* The DTV tuner requirement became applicable to television receivers with screen sizes less than 13 inches (measured diagonally) on January 30, 2008. See *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 23 FCC Rcd 2994, 3081, para. 190 (2007) (correcting language in Section 15.117(i)(2) regarding receivers with screen sizes less than 13 inches); *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Final Rule, 73 Fed. Reg. 5634 (Jan. 30, 2008) (publishing the rule correction).

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conclude that Hannspree shipped a total of 5,519 units, only 236 of which were non-DTV-compliant.²⁴ We thus affirm our finding that Hannspree willfully²⁵ and repeatedly²⁶ violated Section 15.117(i)(1)(iii) of the Rules by shipping in interstate commerce television receivers that were not equipped with DTV tuners, but modify the decision to reflect the interstate shipment of 236 non-DTV-compliant television receivers—or 13 fewer units—within the one year preceding the issuance of the *NAL*. Consistent with Commission precedent, we reduce the forfeiture to \$11,800 (236 units x \$50 per unit) for Hannspree's willful and repeated violation of Section 15.117(i)(1)(iii) of the Rules²⁷ in connection with its interstate shipment of television receivers that did not comply with the DTV tuner requirement.²⁸

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended,²⁹ and Section 1.106 of the Commission's rules,³⁰ the Petition for Reconsideration filed by Hannspree North America, Inc. hereby **IS GRANTED IN PART AND DENIED IN PART**.

²⁴ To arrive at this number, the Bureau excluded the following units that were compliant with the Rules or were otherwise not subject to forfeiture penalty: 1,404 units that, in fact, contained DTV tuners; 6 units that were exported; 3,521 units that were shipped more than one year before the August 28, 2008, issuance of the *NAL*; and 352 units with screen sizes less than thirteen inches that were shipped before the January 30, 2008, DTV tuner effective date for such receivers. Because of the order in which these exclusions are applied, certain overlap among the units within these categories, and the inclusion of additional DTV-compliant units, the numbers of receivers in each category differ somewhat from those represented in the *NAL*.

²⁵ Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312 clarifies that this definition of willful applies to both Sections 312 and 503 of the Act, H.R. Conf. Rep. No. 97-765 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (*Southern California*); see also *Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237, para. 12 (2008), *consent decree ordered*, Order and Consent Decree, 27 FCC Rcd 4110 (2012); *San Jose Navigation, Inc.*, Forfeiture Order, 22 FCC Rcd 1040, 1042, para. 9 (2007), *consent decree ordered*, Order and Consent Decree, 25 FCC Rcd 1494 (2010).

²⁶ Section 312(f)(2) of the Act, which also applies to forfeitures assessed pursuant to Section 503(b) of the Act, provides that "[t]he term 'repeated' . . . means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). See *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 9 (2001), *forfeiture ordered*, Forfeiture Order, 17 FCC Rcd 22626 (2002) (forfeiture paid); *Southern California*, 6 FCC Rcd at 4388, para. 5.

²⁷ 47 C.F.R. § 15.117(i)(1)(iii).

²⁸ See, e.g., *Precor, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6361, 6367, para. 16. (2008) (applying the following tiered approach to the forfeiture calculation: 0–1000 units: \$50 per unit; 1001–2500 units: \$75 per unit; 2501–5000 units: \$100 per unit; 5001–10,000 units: \$125 per unit; 10,001–20,000 units: \$150 per unit; 20,001–30,000 units: \$175 per unit; 30,001–40,000 units: \$200 per unit; 40,001–50,000 units: \$225 per unit; 50,001+ units: \$250 per unit).

²⁹ 47 U.S.C. § 405.

³⁰ 47 C.F.R. § 1.106.

10. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,³¹ Hannspree North America, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand eight hundred dollars (\$11,800) for violation of Section 15.117(i)(1)(iii) of the Rules.

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within fifteen (15) calendar days after the release date of this Memorandum Opinion and Order.³² If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.³³ Hannspree North America, Inc. shall send electronic notification of payment to Daudeline Meme at Daudeline.Meme@fcc.gov, Kevin Pittman at Kevin.Pittman@fcc.gov, and to Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made.

12. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁴ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

13. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁵ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

³¹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

³² See 47 C.F.R. § 1.80.

³³ See 47 U.S.C. § 504(a).

³⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

³⁵ See 47 C.F.R. § 1.1914.

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MONTE L. HENRY

14. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by First Class Mail and by Certified Mail, return receipt requested, to Hannspree North America, Inc. at 14450 Myford Road, Suite 100, Irvine, CA 92606.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Glenn S. Yamada) File No.: EB-FIELDWR-12-00001081
) NAL/Acct. No.: 201232780001
Kenai, Alaska) FRN: 0021897384
)
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 17, 2012

Released: July 18, 2012

By the Resident Agent, Anchorage Resident Agent Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Glenn S. Yamada, a Citizens Band (CB) radio operator in Kenai, Alaska, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ and Sections 95.409(a) and 95.411(a)(1) and (b) of the Commission's rules (Rules),² by operating a radio transmitter without the requisite Commission authorization. We conclude that Mr. Yamada is apparently liable for a forfeiture in the amount of twelve thousand five hundred dollars (\$12,500). In addition, no later than thirty (30) calendar days from the date of this NAL, Mr. Yamada must submit a statement signed under penalty of perjury that he is no longer engaged in unlicensed radio operations.

II. BACKGROUND

2. On January 22, 2012, the Commission received a complaint of interference to an authorized user in the aeronautical band, a safety of life service, on the frequency 21.964 MHz. The complaint concerned a male subject talking and interfering with the control and monitoring of air traffic over the North Atlantic. For several days, the Commission's High Frequency Direction Finding Center (HFDFC) monitored frequency 21.964 MHz and, on January 31, 2012, observed a subject matching the details of the complaint transmitting on the frequency 21.965 MHz. Over the next several days, the HFDFC determined that the subject was using the call "1600 Alaska"; that the subject's actual operating frequency was 27.025 MHz (CB channel 6); and that the subject's location was Kenai, Alaska.

3. On February 6, 2012, an agent from the Enforcement Bureau's Anchorage Resident Agent Office (Anchorage Office) investigated the complaint of interference. The agent, using direction-finding techniques, located the source of the interference to Mr. Yamada's residence in Kenai, Alaska.³ The interfering signal to frequency 21.964 MHz was determined to be on frequency 21.965 MHz and

¹ 47 U.S.C. § 301.

² 47 C.F.R. §§ 95.409(a), 95.411(a)(1) and (b).

³ A review of the Commission's Universal Licensing System revealed that Mr. Yamada had no individual license to operate a CB radio station.

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correlated with CB station operation on CB Channel 6, frequency 27.025 MHz, emanating from Mr. Yamada's residence.⁴ On the same day, the Anchorage agent, accompanied by a police officer from the Kenai Police Department, inspected Mr. Yamada's CB station. The agent observed a non-certificated CB transmitter and a linear amplifier as part of Mr. Yamada's CB station. Mr. Yamada admitted to the agent that the linear amplifier was capable of generating a power output of 200 watts. The agent observed that the transmitter and the linear amplifier were connected, and that the linear was connected to a transmission cable and ultimately to the directional antenna at the back of Mr. Yamada's residence. Mr. Yamada told the agent that this was his hobby setup and that he had been operating it for the last several weeks.⁵

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁶ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁰ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹¹

⁴ Apparently, faulty equipment in use by Mr. Yamada on CB Channel 6 produced a spurious signal on frequency 21.965 MHz, the source of the interference to frequency 21.964 MHz.

⁵ Mr. Yamada admitted to the Anchorage agent that he used the "handle" "1600 Alaska."

⁶ 47 U.S.C. § 503(b).

⁷ 47 U.S.C. § 312(f)(1).

⁸ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,]. . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

⁹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁰ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹¹ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

A. Unlicensed Operation in the Personal Radio Service, Citizens Band

5. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.¹² Section 95.404 of the Rules states that CB operators are not required to have individual licenses because they are authorized by this rule to operate a CB station, provided, however, that they operate the station in accordance with Subpart D of Part 95 of the Rules (CB Rules).¹³ Section 95.409(a) of the Rules states that CB operators must use FCC certificated CB transmitters at their CB stations, and that the use of a transmitter that is not FCC certificated voids their authority to operate the station.¹⁴ Furthermore, Section 95.411(a)(1) of the Rules states that CB operators may not attach external radio frequency (RF) power amplifiers (sometimes called linear or linear amplifiers) to certificated CB transmitters in any way.¹⁵ Section 95.411(b) of the Rules states that there are no exceptions to this rule and that use of a power amplifier voids their authority to operate the station.¹⁶

6. On February 6, 2012, the Anchorage agent identified Mr. Yamada as the operator that the Commission's HFDFC observed interfering with safety of life operations on the frequency 21.965 MHz over multiple days in January and February 2012. The agent's inspection of Mr. Yamada's CB radio station revealed that Mr. Yamada was operating a non-certificated transmitter with an RF linear amplifier. Mr. Yamada admitted to the agent that he operated the devices for several weeks. Such operation voided Mr. Yamada's authority to operate his CB radio station under the CB Rules. As Mr. Yamada had no other authority to operate a CB station, his operation was unauthorized. Consequently, we find that Mr. Yamada apparently willfully and repeatedly violated Section 301 of the Act, and Sections 95.409(a) and 95.411(a)(1) and (b) of the Rules, by operating a CB radio station without authorization.

B. Proposed Forfeiture Amount and Reporting Requirement

7. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization for the service is \$10,000.¹⁷ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁸ Here, we find that an upward adjustment of the base forfeiture amount is warranted because of the gravity of the violations. As the record reflects, Mr. Yamada's unauthorized operations posed a significant public safety risk, given the interference caused to an authorized user in the aeronautical band (a safety of life service). Applying the *Forfeiture Policy*

¹² 47 U.S.C. § 301.

¹³ 47 C.F.R. § 95.404.

¹⁴ 47 C.F.R. § 95.409(a).

¹⁵ 47 C.F.R. § 95.411(a)(1).

¹⁶ 47 C.F.R. § 95.411(b). The FCC will presume you have used a linear or other external RF power amplifier if the amplifier is located in the operator's premises and if there is other evidence showing that the station was operated with more power than authorized. See 47 C.F.R. § 95.410.

¹⁷ The Commission's *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁸ 47 U.S.C. § 503(b)(2)(E).

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Statement, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Yamada is apparently liable for a forfeiture in the amount of \$12,500.

8. Furthermore, given the public safety concerns of the violations, we also direct Mr. Yamada to submit a statement signed under penalty of perjury confirming whether he is still engaged in CB operations and, if so, to state if he: (1) is using a certified CB transmitter; and (2) has not attached any linear amplifiers to his CB station. This statement must be provided to the Anchorage Office at the address listed in paragraph 11, below, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. Failure to comply with this requirement could subject the licensee to additional enforcement action.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Glenn S. Yamada is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twelve thousand five hundred dollars (\$12,500) for violations of Section 301 of the Act and Sections 95.409(a) and 95.411(a)(1) and (b) of the Rules.¹⁹

10. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Glenn S. Yamada **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. **IT IS FURTHER ORDERED** that Glenn S. Yamada **SHALL SUBMIT** a written statement, as described in paragraph 8, above, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Anchorage Office, PO Box 231949, Anchorage, AK 99523-1949. Glenn S. Yamada shall also e-mail the written statement to WR-Response@fcc.gov.

12. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Glenn S. Yamada shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure

¹⁹ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 95.409(a), 95.411(a)(1) and (b).

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

13. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Anchorage Resident Agent Office, P.O. Box 231949, Anchorage, AK 99523-1949, and include the NAL/Acct. No. referenced in the caption. Glenn S. Yamada also shall e-mail the written response to WR-Response@fcc.gov.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Glenn S. Yamada, at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

David J. Charlton
Resident Agent
Anchorage Resident Agent Office
Western Region
Enforcement Bureau

²¹ See 47 C.F.R. § 1.1914.

²² 47 C.F.R. §§ 1.16, 1.80(f)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
	)	File No.: EB-07-SE-310
Cardinal Broadband, LLC,)	
aka Sovereign Telecommunications,	)	NAL/Acct. No.: 200832100070
a wholly owned subsidiary of Cardinal)	
Communications, Inc.	)	FRN: 0018035063

FORFEITURE ORDER

Adopted: July 13, 2012**Released: July 13, 2012**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to Cardinal Broadband, LLC, aka Sovereign Telecommunications, a wholly-owned subsidiary of Cardinal Communications, Inc.,¹ for its willful and repeated violation of Section 9.5(b) of the Federal Communication Commission's rules (Rules).² The noted violation involves Cardinal's failure to provide E911 service (for more than two months) in connection with its Voice over Internet Protocol (VoIP) offering. This Forfeiture Order furthers the Commission's longstanding and continuing commitment to promoting E911 service to help ensure the safety and welfare of all Americans.³

II. BACKGROUND

2. On August 15, 2008, the Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) issued a *Notice of Apparent Liability for Forfeiture* to Cardinal in the amount of \$25,000 for its apparent violation of Section 9.5 of Rules by failing to provide E911 service.⁴ The Bureau's investigation into this matter was initiated by a complaint that Cardinal, an interconnected

¹ Cardinal Broadband, LLC (Cardinal) was formed in 2005 as a Colorado limited liability company. On October 1, 2010, pursuant to an acquisition by Roomlinx, Inc. of Cardinal's parent, Roomlinx, Inc. became the sole member of Cardinal. See Roomlinx, Inc., Annual Report (Form 10-K), at 50 (Mar. 30, 2012).

² 47 C.F.R. § 9.5(b).

³ In the Matter of E911 Enabled Services; E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, WC Docket No. 05-196, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, 10246, para. 5 (2005).

⁴ *Cardinal Broadband, LLC*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 12224 (Enf. Bur. 2008) (*VoIP E911 NAL*). In a matter closely related to the *VoIP E911 NAL*, the Bureau issued a *Notice of Apparent Liability for Forfeiture* to Cardinal in the amount of \$25,000 for its apparent violation of Section 1.17(a)(2) of the Rules by providing incorrect material factual information to the Commission without a reasonable basis for believing that the information was correct and accurate. *Cardinal Broadband, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12233 (Enf. Bur. 2008) (*Section 1.17 NAL*). In a companion decision issued concurrently with this Forfeiture Order, we affirm the *Section 1.17 NAL*.

VoIP service provider, was not providing E911 service to residents of a condominium complex called Millstone in Golden, Colorado. Specifically, the complaint alleged that residents of the condominium complex could not make E911 calls and could not reach their local police department. In the *VoIP E911 NAL*, the Bureau determined that Cardinal was subject to the requirements of Section 9.5 as a provider of interconnected VoIP services and that Cardinal failed to provide compliant E911 service.⁵

3. Cardinal submitted a single response to both the *VoIP E911 NAL* and the *Section 1.17 NAL*.⁶ In this Consolidated NAL Response, Cardinal disputes the finding in the *VoIP E911 NAL* that it is an interconnected VoIP service provider.⁷ Cardinal also contends that the failure to provide compliant E911 service was the fault of Prime Time Communications, the third party whose VoIP service Cardinal was reselling at the Millstone condominium complex.⁸ Cardinal further asserts that no violation occurred during the one year period prior to the issuance of the *VoIP E911 NAL* and that its actions were neither "willful" nor "repeated."⁹ Finally, Cardinal requests cancellation or reduction of the proposed forfeiture on the ground that payment would pose a financial hardship.¹⁰

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (the Act),¹¹ Section 1.80 of the Rules,¹² and the *Forfeiture Policy Statement*.¹³ In examining Cardinal's Consolidated NAL Response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁴ As discussed below, we have considered Cardinal's response in light of these statutory factors and find that neither cancellation nor reduction of the forfeiture is warranted.

A. Failure to provide interconnected VoIP service

5. Section 9.5(b)(1) of the Rules states, in relevant part, that "[i]nterconnected VoIP service providers must, as a condition of providing service to a consumer, provide that consumer with E911 service as described in this section."¹⁵ As set forth in the *VoIP E911 NAL*, the Bureau determined that

⁵ *VoIP E911 NAL*, 23 FCC Rcd at 12227-12228, paras. 9, 12.

⁶ See Letter from Ed Garneau, Manager, Cardinal Broadband, LLC, to Spectrum Enforcement Division, FCC Enforcement Bureau (Oct. 10, 2008) (Consolidated NAL Response) at 1-2.

⁷ Consolidated NAL Response at 2.

⁸ *Id.* at 1-2.

⁹ *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ 47 U.S.C. § 503(b).

¹² 47 C.F.R. § 1.80.

¹³ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁴ 47 U.S.C. § 503(b)(2)(E).

¹⁵ 47 C.F.R. § 9.5(b)(1); *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10266, para. 37 (2005) (*VoIP 911 Order*), *aff'd sub nom. Nuvio v. FCC*, 473 F.3d 302 (D.C. Cir. 2006). See also, 47 C.F.R. § 9.5(a) (making the E911 service requirements "applicable to providers of interconnected VoIP services"). An interconnected VoIP service is (continued ...)

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Cardinal was subject to the requirements of Section 9.5 “as a provider of interconnected VoIP services”¹⁶ and that Cardinal failed to provide compliant E911 service.¹⁷

6. In its Consolidated NAL Response, Cardinal again argues that the service it provides does not meet the definition of “interconnected VoIP service.”¹⁸ The Bureau previously considered and properly rejected this argument in the *VoIP E911 NAL*.¹⁹ As the Bureau noted, the “Commission made no distinction between providers who own and operate their own facilities, services, or networks, and those who outsource some or all of those functions to others.”²⁰ Cardinal presents no additional arguments and no new evidence that would alter our conclusion that, as a reseller of VoIP service, Cardinal was a provider of interconnected VoIP within the meaning of Section 9.5 of the Rules and therefore was obligated to provide fully compliant E911 service.

7. We also find unpersuasive Cardinal’s argument that no forfeiture should be imposed for its violation of Section 9.5(b) because the failure to provide E911 service to the Millstone condominium community was the fault of Prime Time Communications, the third party whose interconnected VoIP service Cardinal resold.²¹ In this instance, Cardinal has acknowledged that it resells interconnected VoIP service at the Millstone condominium community.²² As a consequence, Cardinal was a provider of interconnected VoIP service and was responsible for its compliance with Section 9.5.²³ Moreover, the Commission has consistently “refused to excuse licensees from forfeiture penalties where the actions of employees, independent contractors, or agents have resulted in violations.”²⁴

(Continued from previous page)

a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet Protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN. See 47 C.F.R. § 9.3; see also *VoIP 911 Order*, 20 FCC Rcd at 10257-10258, para. 24.

¹⁶ *VoIP E911 NAL*, 23 FCC Rcd at 12227, para. 9.

¹⁷ *Id.* at 12228, para. 12.

¹⁸ Consolidated NAL Response at 2.

¹⁹ *VoIP E911 NAL*, 23 FCC Rcd at 12226-12228, paras. 8-12. In response to the Bureau’s inquiries, Cardinal argued that it “do[es] not provide interconnected VoIP service,” but has acknowledged that it resells interconnected VoIP service. See Letter from Edward A. Garneau, Chief Executive Officer, Cardinal Communications, Inc., and Ronald S. Bass, Principal Accounting Officer, Cardinal Communications, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, and Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, FCC Enforcement Bureau (Oct. 9, 2007) at 3. In the *VoIP E911 NAL*, the Bureau stated that it was not clear from the information provided by Cardinal whether the company was a “reseller” or primary provider of interconnected VoIP service. See *VoIP E911 NAL*, 23 FCC Rcd at 12227, para. 9. The Bureau concluded, however, that “[w]e do not need to decide this issue ... because even assuming that Cardinal resells interconnected VoIP service, it is nevertheless subject to the requirements in section 9.5 of the Commission’s rules as a provider of interconnected VoIP services.” *Id.*

²⁰ *VoIP E911 NAL*, 23 FCC Rcd at 12227, para. 9.

²¹ Consolidated NAL Response at 2.

²² See Letter from Ronald S. Bass, Principal Accounting Officer, Cardinal Communications, Inc., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, FCC Enforcement Bureau (Jan. 7, 2008) (January 7 Response) at 4.

²³ See *VoIP E911 NAL*, 23 FCC Rcd at 12227, para. 9.

²⁴ See, e.g., *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64, para. 7 (2002) (concluding that an antenna structure owner was responsible for the willful acts and omissions of its contractor when the contractor failed to monitor obstruction lights to ensure compliance with the Commission’s Rules); *Triad Broadcasting Company, Inc.*, Memorandum Opinion and Order, 96 FCC 2d 1235, 1244, para. 21 (continued ...)

8. In addition, we reject Cardinal's claim that its violation of Section 9.5(b) was not "willful" because Cardinal "tried to immediately remedy the situation once made aware of it."²⁵ Section 312(f)(1) of the Act, which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act"²⁶ Cardinal's subsequent remedial measures, while laudable, are irrelevant to whether its actions were "willful" within the meaning of Section 312(f)(1) of the Act.²⁷

9. We similarly reject Cardinal's assertion that its violation of Section 9.5(b) of the Rules was not "repeated."²⁸ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."²⁹ As noted below, the record before us establishes that Cardinal's violation of Section 9.5(b) spanned multiple days (more than two months), continuing until as late as October 23, 2007.³⁰

B. Proposed forfeiture consistent with Section 503(b)(6)

10. In its Consolidated NAL Response, Cardinal also argues for the first time that E911 service at the Millstone condominium "was fixed in early August of 2007[.]" two months earlier than Cardinal indicated in its prior sworn statements.³¹ On this basis, Cardinal claims that it is "not aware of a violation that occurred during the [one] year prior to issuance of this NAL[.]"³² While Section 503(b)(6) of the Act bars the Commission from proposing a forfeiture for violations that occurred more than one year prior to the issuance of a notice of apparent liability for forfeiture,³³ we do not find Cardinal's latest claim to be credible or reliable; it is exceedingly general (referring only to "early August of 2007"), is unsupported by any documentary evidence, and contradicts detailed, sworn information Cardinal provided to the Bureau during the course of the investigation.

(Continued from previous page) _____

(1984) (determining that Commission licensee could not escape forfeiture liability where actions by its legal counsel resulted in Commission violations).

²⁵ Consolidated NAL Response at 2.

²⁶ 47 U.S.C. § 312(f)(1). See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

²⁷ The Commission has repeatedly held that post-violation corrective measures are not sufficient to avoid liability. See, e.g., *AT&T Wireless Services, Inc.*, Forfeiture Order, 17 FCC Rcd 21866, 21870-71, para. 14 (2002); *America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355, para. 13 (2001); *Coleman Enters., Inc. d.b.a. Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24388, para. 8 (2000).

²⁸ Consolidated NAL Response at 2.

²⁹ 47 U.S.C. § 312(f)(2). See *Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362, para. 9 (2001); *Southern California*, 6 FCC Rcd at 4388, para. 5.

³⁰ January 7 Response at 4. Even assuming, however, that fully compliant E911 service was provided to the Millstone condominium community at an earlier date (i.e., on August 15, 2007), see *infra* paras. 10-11, Cardinal has acknowledged that multiple customers at the Millstone condominium property experienced E911 service problems. *Id.* (stating that the service offered at the Millstone condominium community included "30 telephone numbers servicing 28 customers"). Cardinal therefore would have repeatedly violated the rule as to multiple customers.

³¹ Consolidated NAL Response at 2.

³² *Id.*

³³ 47 U.S.C. § 503(b)(6).

11. Specifically, Cardinal had previously declared under penalty of perjury that it switched its VoIP service provider from Prime Time Communications to Simple Signal in July 2007, that Simple Signal “began” servicing customers at the Millstone condominium community on August 15, 2007,³⁴ and that *all* VoIP customers at the Millstone condominium were provided E911-compliant service “by or before October 23, 2007.”³⁵ In the absence of any documentary evidence to counter Cardinal’s initial report, or even an explanation of the conflicting claims on when compliant E911 service commenced, we have no basis on which to conclude that Cardinal’s earlier sworn statements are inaccurate or that Cardinal provided fully compliant E911 service prior to August 15, 2007. Regardless of whether Cardinal’s violation of Section 9.5(b) ended on August 15, 2007 or October 23, 2007, the *VoIP E911 NAL* was issued within the one year statute of limitations in accordance with the requirements of Section 503(b)(6) of the Act.

C. Lack of a basis for reduction of the proposed forfeiture

12. Finally, Cardinal asserts that payment of the proposed forfeiture would pose a financial hardship.³⁶ The Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.³⁷ In addition, and as detailed in the instructions provided in the *VoIP E911 NAL*, “[c]laims of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting procedures for the most recent three year period.”³⁸ Cardinal only submitted financial statements covering the eight-month period, January through August 2008. Moreover, Cardinal’s revenues, as reflected in the limited financial statements it did submit, would not warrant a reduction of the forfeiture amount.³⁹

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act⁴⁰ and Sections 0.111, 0.311, and 1.80 of the Rules,⁴¹ Cardinal Broadband, LLC **IS LIABLE FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for failing to provide compliant E911 service in willful and repeated violation of Section 9.5(b) of the Rules.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within ten (10) calendar days after the release date of this Forfeiture Order.⁴² If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for

³⁴ January 7 Response at 4.

³⁵ *Id.*

³⁶ Consolidated NAL Response at 3.

³⁷ See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089, para. 8 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator’s gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator’s gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues).

³⁸ See *VoIP E911 NAL*, 23 FCC Rcd at 12232, para. 24.

³⁹ Based on established precedent, the \$25,000 forfeiture proposed in the *VoIP E911 NAL* is not excessive in comparison to Cardinal’s reported gross revenues. See *supra* note 37.

⁴⁰ 47 U.S.C. § 503(b).

⁴¹ 47 C.F.R. §§ 0.111, 0.311, 1.80.

⁴² *Id.* § 1.80.

enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴³ Cardinal shall send electronic notification of payment to Josh Zeldis at Josh.Zeldis@fcc.gov and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made.

15. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁴ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

16. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁴⁵ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

17. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to Jon Bartlett, President, Cardinal Broadband, LLC, 2150 West 6th Avenue, Suite H, Broomfield, CO 80020 and to Michael Wasik, Chairman and CEO, Roomlinx, Inc., 2150 West 6th Avenue, Suite H, Broomfield, CO 80020.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

⁴³ 47 U.S.C. § 504(a).

⁴⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁵ See 47 C.F.R. § 1.1914.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
	)	File No.: EB-07-SE-310
Cardinal Broadband, LLC,)	
aka Sovereign Telecommunications,	)	NAL/Acct. No.: 200832100069
a wholly owned subsidiary of Cardinal)	
Communications, Inc.	)	FRN: 0018035063

FORFEITURE ORDER

Adopted: July 13, 2012

Released: July 13, 2012

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to Cardinal Broadband, LLC, aka Sovereign Telecommunications, a wholly-owned subsidiary of Cardinal Communications, Inc.,¹ for its willful violation of Section 1.17(a)(2) of the rules (Rules) of the Federal Communication Commission (FCC or Commission).² The noted violation involved Cardinal's provision of incorrect material factual information related to Cardinal's failure to provide E911 service to dozens of its customers at the Millstone condominium community in Golden, Colorado for more than two months. We conclude that Cardinal provided the information to the Commission without a reasonable basis for believing that the information was correct and not misleading.

II. BACKGROUND

2. On August 15, 2008, the Enforcement Bureau (Bureau) issued a *Notice of Apparent Liability for Forfeiture* to Cardinal in the amount of \$25,000 for its apparent violation of Section 1.17(a)(2) of the Rules by providing incorrect material factual information to the Commission without a reasonable basis for believing that the information was correct and not misleading.³ In a matter closely related to the *Section 1.17 NAL*, the Bureau issued a *Notice of Apparent Liability for Forfeiture* to Cardinal in the amount of \$25,000 for its apparent failure to provide E911 service in willful and repeated violation of Section 9.5(b) of the Commission's Rules.⁴ In the *VoIP E911 NAL*, the Bureau determined

¹ Cardinal Broadband, LLC (Cardinal) was formed in 2005 as a Colorado limited liability company. On October 1, 2010, pursuant to an acquisition by Roomlinx, Inc. of Cardinal's parent, Roomlinx, Inc. became the sole member of Cardinal. See Roomlinx, Inc., Annual Report (Form 10-K), at 50 (Mar. 30, 2012).

² 47 C.F.R. § 1.17(a)(2).

³ *Cardinal Broadband, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Red 12233 (Enf. Bur. 2008) (*Section 1.17 NAL*).

⁴ *Cardinal Broadband, LLC*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Red 12224 (Enf. Bur. 2008) (*VoIP E911 NAL*). Section 9.5(b)(1) of the Rules provides, in relevant part, that providers of interconnected Voice over Internet Protocol (VoIP) service "must, as a condition of providing service to a consumer, provide that consumer with E911 service as described in this section." 47 C.F.R. § 9.5(b)(1). See *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Red 10245, 10266, para. 37 (2005) (*VoIP E911 Order*). *aff'd sub nom. Nuvio v. FCC*, 473 F.3d 302 (D.C. Cir. (continued ...)

that Cardinal was subject to the requirements of Section 9.5 as a provider of interconnected VoIP services and that Cardinal failed to provide compliant E911 service.⁵

3. In the *Section 1.17 NAL*, the Bureau concluded that Cardinal's statement in the company's response to the Bureau's initial letter of inquiry⁶ that "[t]he service Cardinal resells does not 'require a broadband connection from the user's location' ... [or] 'Internet protocol-compatible customer premises equipment'"⁷ (CPE), and thus does not meet two of the four criteria for interconnected VoIP service, was incorrect material factual information.⁸ Specifically, the Bureau found that, based on Cardinal's publicly available marketing material and its subsequent admission that it provides interconnected VoIP service, Cardinal failed to exercise reasonable diligence to determine the accuracy of the information it provided, and therefore, at the time it made the representations to the Bureau, Cardinal did not have a reasonable basis for believing that the information was correct and not misleading.⁹

4. On October 10, 2008, Cardinal filed a single response to both the *Section 1.17 NAL* and the *VoIP E911 NAL*.¹⁰ In this Consolidated NAL Response, Cardinal disputes the conclusion that it violated Section 1.17(a)(2) of the Rules.¹¹ Alternatively, Cardinal requests cancellation or reduction of the proposed forfeiture on the ground that payment would pose a financial hardship.¹²

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),¹³ Section 1.80 of the Rules,¹⁴ and the *Forfeiture Policy Statement*.¹⁵ In examining Cardinal's Consolidated NAL Response, Section 503(b) of (Continued from previous page) _____
2006). See also, 47 C.F.R. § 9.5(a) (making the E911 service requirements "applicable to providers of interconnected VoIP services"). An interconnected VoIP service is a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet Protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN. See 47 C.F.R. § 9.3; see also *VoIP E911 Order*, 20 FCC Rcd at 10257-58, para. 24.

⁵ *VoIP E911 NAL*, 23 FCC Rcd at 12227-12228, paras. 9, 12. In a companion decision issued concurrently with this Forfeiture Order, we affirm the *VoIP E911 NAL*.

⁶ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, to Cardinal Communications, Inc. (Sept. 10, 2007) (Initial LOI).

⁷ Letter from Edward A. Gameau, Chief Executive Officer, Cardinal Communications, Inc., and Ronald S. Bass, Principal Accounting Officer, Cardinal Communications, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, and Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, FCC Enforcement Bureau (Oct. 9, 2007) (Initial LOI Response) at 3 (emphasis in original).

⁸ *Section 1.17 NAL*, 23 FCC Rcd at 12235, para. 7.

⁹ *Id.* at 12235, para. 8.

¹⁰ See *Cardinal Broadband, LLC*, Opposition to Notices of Apparent Liability for Forfeiture (filed Oct. 10, 2008) (Consolidated NAL Response). Cardinal requested and was granted an extension of time to respond.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ 47 U.S.C. § 503(b).

¹⁴ 47 C.F.R. § 1.80.

¹⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ As discussed below, we have considered Cardinal's response in light of these statutory factors and find that neither cancellation nor reduction of the proposed forfeiture amount is warranted.

A. Provision of incorrect material factual information

6. Section 1.17(a) of the Rules¹⁷ provides, in pertinent part, that in any investigation, no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

7. Any person who has received a letter of inquiry from the Commission or its staff or is otherwise the subject of a Commission investigation must comply with the requirements of Section 1.17 of the Rules.¹⁸ In expanding the scope of Section 1.17 in 2003 to include written statements made without a reasonable basis for believing the statements are correct and not misleading, the Commission explained that it intended this requirement to clarify the obligations of persons dealing with the Commission, ensure that they exercised due diligence in preparing written submissions, and enhance the effectiveness of the Commission's enforcement efforts.¹⁹ Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if provided without a reasonable basis for believing that the material factual information it contains is correct and not misleading.²⁰

8. In its Consolidated NAL Response, Cardinal argues that no forfeiture should be imposed because the company's statement in its Initial LOI response that "[t]he service Cardinal resells does not 'require a broadband connection from the user's location' ... [or] 'Internet protocol-compatible [CPE]'" was accurate in light of the way that Cardinal provides service to its customers.²¹ Although Cardinal's Consolidated NAL Response does not explain the basis for this claim, we can glean the company's

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ 47 C.F.R. § 1.17(a).

¹⁸ *Id.* § 1.17(b)(4).

¹⁹ *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4016-17, paras. 1-2, 4021, para. 12 (2003) ("Amendment of Section 1.17"), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004).

²⁰ *See Amendment of Section 1.17*, 18 FCC Rcd at 4017, para. 2 (stating that the revision to Section 1.17 is intended to "prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive").

²¹ Consolidated NAL Response at 2.

apparent rationale from prior filings.²² In its January 7 LOI Response, for example, Cardinal reiterated that the service it resells does not require either a broadband connection or Internet Protocol-compatible CPE, noting that what it “did not make clear” in its Initial LOI Response was that the “service” the company resells includes both interconnected VoIP and conventional analog telephone service and that customers who elect to use conventional analog telephone service do not need either a broadband connection or Internet Protocol-compatible CPE.²³

9. At the outset, we note that the Bureau previously considered and properly rejected Cardinal’s argument that it is not an interconnected VoIP service provider because it also sells Qwest analog telephone service, a service that does not require either a broadband connection or Internet Protocol-compatible CPE.²⁴ In the *VoIP E911 NAL*, the Bureau stated that “[c]onventional analog telephone service and interconnected VoIP service are distinct services[.]” and that “Cardinal’s status as an interconnected VoIP service provider is unaffected by the fact that it also offers conventional analog telephone service.”²⁵

10. Moreover, we find that Cardinal’s unqualified statement in its Initial LOI Response that the service Cardinal resells does not “require” a broadband connection or Internet Protocol-compatible CPE was both inaccurate and misleading. The critical question at issue in the LOI was whether Cardinal’s *VoIP offering* met the thresholds in Section 9.5(a), specifically, whether a broadband connection and Internet Protocol-compatible CPE were required in order to utilize Cardinal’s VoIP service.²⁶ Cardinal subsequently admitted that its VoIP service requires these capabilities.²⁷ For the reasons set forth in the *Section 1.17 NAL*, we affirm the finding that Cardinal did not have a reasonable basis for claiming otherwise or for believing that the information it initially provided was correct and not misleading.

11. Cardinal appears to rely on the fact that it resells two different services (interconnected VoIP and conventional analog telephone) and that one of those services (conventional analog telephone) does not require a broadband connection or Internet Protocol-compatible CPE. However, the ability of Cardinal’s customers to choose a non-VoIP offering is not relevant to the nature and requirements of its VoIP service. Indeed, to find for Cardinal we would have to conclude that Cardinal’s customers who chose the VoIP offering were not “required” to have the broadband connection or Internet Protocol-compatible CPE necessary to that service because they could have chosen analog service instead. This argument is counterintuitive. In addition, if Cardinal had exercised even a minimum of diligence, such as

²² See Letter from Ronald S. Bass, Principal Accounting Officer, Cardinal Communications, Inc., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, FCC Enforcement Bureau (Jan. 7, 2008) (January 7 LOI Response) at 3, 7, 15, 19.

²³ *Id.* at 7 (stating that “[w]hat we did not make clear is we offer digital service side-by-side with Qwest analog service so no internet related equipment is required. If a customer wants analog phone we get it for them through Qwest hence, there is no requirement for a broadband connection nor is there a requirement for customer premises equipment.”).

²⁴ *VoIP E911 NAL*, 23 FCC Rcd at 12228, para. 11.

²⁵ *Id.*

²⁶ See Initial LOI. The second inquiry in the Initial LOI directed Cardinal to respond to the following question regarding Cardinal’s VoIP service offering: “State whether Cardinal currently provides interconnected VoIP service to the public.” *Id.* at 1.

²⁷ January 7 LOI Response at 17-18. The record indicates that the service Cardinal resold uses an integrated access device (IAD) to connect through a T1 to the provider’s server, which then connected with the PSTN. *Id.* at 17.

by reviewing its own marketing materials, the *VoIP E911 Order* or Section 9.3 of the Rules,²⁸ it could have avoided the inaccuracies in its statement.²⁹ By failing to either perform reasonable due diligence or to adequately explain its statement, Cardinal omitted from its initial LOI Response “information that is necessary to prevent any material factual statement that is made from being incorrect or misleading,” precisely the outcome that Section 1.17 was intended to prevent.³⁰

12. Further, we disagree with Cardinal’s contention that that the proposed forfeiture should be cancelled or reduced because Ronald Bass, the Cardinal employee who submitted the company’s Initial LOI Response, believed at that time that the response was accurate.³¹ As noted in the *Section 1.17 NAL*, even absent intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if provided without a reasonable basis for believing that the material factual information it contains is correct and not misleading.³² As a consequence, the assertion that Mr. Bass believed the response to be truthful, even if accurate, is not enough for Cardinal to avoid liability under Section 1.17. In this regard, we note that Cardinal’s acknowledgment in the Consolidated NAL Response that Mr. Bass, Cardinal Communications, Inc.’s Principal Accounting Officer, was “probably not the best person to handle the response since Mr. Bass is an accountant and not a telecom employee”³³ underscores the Bureau’s previous finding that Cardinal failed to exercise reasonable due diligence to ensure that the statements the company made in its Initial LOI Response were truthful, accurate, and not misleading.³⁴

13. Cardinal’s provision of incorrect material factual information is especially egregious given the vital public safety matter at issue. The Commission has found that violations of E911 requirements are serious, noting the critical function these requirements serve in promoting and safeguarding life and property.³⁵ As the Commission has stated, “E911 service saves lives and property by helping emergency services personnel do their jobs more quickly and efficiently.”³⁶ Moreover,

²⁸ Both the *VoIP E911 Order* and Section 9.3 of the Rules clearly define interconnected VoIP as a service that, *inter alia*, requires a broadband connection from the user’s location and Internet Protocol-compatible CPE. See *supra* note 4.

²⁹ *Section 1.17 NAL*, 23 FCC Rcd at 12236, para. 8. As the Commission has stated, parties must “use due diligence in providing information that is correct and not misleading to the Commission, including taking appropriate affirmative steps to determine the truthfulness of what is being submitted. A failure to exercise such reasonable diligence would mean that the party did not have a reasonable basis for believing in the truthfulness of the information.” See *Amendment of Section 1.17 of the Commission’s Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4021, para. 12 (2003).

³⁰ 47 C.F.R. § 1.17(a). See *Invision Industries, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 13095, 13103-04, para. 25 (2008), *response pending* (finding that a television importer’s failure to exercise due diligence to ensure that the information provided in its LOI Response was not misleading constituted a violation of Section 1.17(a)).

³¹ Consolidated NAL Response at 2.

³² See *Section 1.17 NAL*, 23 FCC Rcd at 12235, para. 6.

³³ Consolidated NAL Response at 2.

³⁴ See *Section 1.17 NAL*, 23 FCC Rcd at 12236, para. 8.

³⁵ See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 FCC Rcd 20850, 20852, para. 2 (1999), *clarified*, 16 FCC Rcd 18982 (2001); see also *Sprint Nextel*, 22 FCC Rcd at 16418, para. 10; *T-Mobile USA, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 3501, 3504, para. 7 (2003) (forfeiture paid).

³⁶ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18679, para. 5 (1996) (subsequent history omitted).

according to the complainant, local emergency officials considered the situation so dire that they distributed flyers warning of the lack of 911 service and directing residents to use the police department's regular number in case of emergency.³⁷ Given the critical importance of providing consumers the ability to call 911, Cardinal should have exercised greater due diligence in preparing its written submissions regarding its provision of E911.

B. Lack of a basis for reduction of the proposed forfeiture

14. Finally, Cardinal asserts that payment of the proposed forfeiture would pose a financial hardship.³⁸ The Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.³⁹ In addition, and as detailed in the instructions provided in the *Section 1.17 NAL*, “[c]laims of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting procedures for the most recent three year period.”⁴⁰ Cardinal only submitted financial statements covering the eight-month period January through August 2008. Moreover, Cardinal's revenues, as reflected in the limited financial statements it did submit, would not warrant a reduction of the forfeiture amount.⁴¹

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,⁴² and Sections 0.111, 0.311, and 1.80 of the Rules,⁴³ Cardinal Broadband, LLC **IS LIABLE FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for providing incorrect material factual information to the Commission in willful violation of Section 1.17(a)(2) of the Rules.

16. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within ten (10) calendar days after the release date of this Forfeiture Order.⁴⁴ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴⁵ Cardinal shall send electronic notification of payment to Josh Zeldis at Josh.Zeldis@fcc.gov and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made.

17. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of

³⁷ *VolP E911 NAL*, 23 FCC Rcd at 12229, para. 17.

³⁸ Consolidated NAL Response at 3.

³⁹ See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089, para. 8 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

⁴⁰ See *Section 1.17 NAL*, 23 FCC Rcd at 12235, para. 15.

⁴¹ Based on established precedent, the \$25,000 forfeiture proposed in the *Section 1.17 NAL* is not excessive in comparison to Cardinal's reported gross revenues. See *supra* note 39.

⁴² 47 U.S.C. § 503(b).

⁴³ 47 C.F.R. §§ 0.111, 0.311, 1.80.

⁴⁴ *Id.* § 1.80.

⁴⁵ 47 U.S.C. § 504(a).

payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁶ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

18. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁴⁷ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

19. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to Jon Bartlett, President, Cardinal Broadband, LLC, 2150 West 6th Avenue, Suite H, Broomfield, CO 80020 and to Michael Wasik, Chairman and CEO, Roomlinx, Inc., 2150 West 6th Avenue, Suite H, Broomfield, CO 80020.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

⁴⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁷ See 47 C.F.R. § 1.1914.



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET S.W.
WASHINGTON D.C. 20554

News media information 202-418-0500
Internet: <http://www.fcc.gov> (or <ftp.fcc.gov>)
TTY (202) 418-2555

DA No. 12-1126

Friday July 13, 2012

Report No. SAT-00882

Policy Branch Information

Actions Taken

The Commission, by its International Bureau, took the following actions pursuant to delegated authority. The effective date of these actions is the release date of this Notice, except where an effective date is specified.

SAT-AMD-20120420-00071 E S2861 DIRECTV Enterprises, LLC

Amendment

Grant of Authority

Effective Date: 07/12/2012

Nature of Service: Direct to Home Fixed Satellite, Fixed Satellite Service

See IBFS File No. SAT-LOA-20120316-00051 for a description of the action taken.

SAT-LOA-20120316-00051 E S2861 DIRECTV Enterprises, LLC

Launch and Operating Authority

Grant of Authority

Effective Date: 07/12/2012

Nature of Service: Direct to Home Fixed Satellite, Fixed Satellite Service

On July 12, 2012, the Satellite Division granted, with conditions, the application of DIRECTV Enterprises, LLC for authority to construct, launch, and operate a 12/14 GHz-band geostationary-satellite orbit space station, DIRECTV KU-79W, at the 79° W.L. orbital location. DIRECTV is authorized to operate DIRECTV KU-79W to provide fixed-satellite service in the 11.7-12.2 GHz (space-to-Earth) and 14.0-14.5 GHz (Earth-to-space) bands. DIRECTV is also authorized to conduct telemetry, tracking, and command operations necessary to maintain DIRECTV KU-79W at the 79° W.L. orbital location using center frequencies located at 14.005 GHz and 14.495 GHz (Earth-to-space), and 11.704 GHz and 11.705 GHz (space-to-Earth).

SAT-RPL-20120326-00061 E S2863 Intelsat License LLC

Replacement Satellite Application (no new frequency)

Grant of Authority

Effective Date: 07/12/2012

Nature of Service: Fixed Satellite Service

On July 12, 2012, the Satellite Division granted, with conditions, authority to Intelsat License LLC to construct, launch, and operate a geostationary orbit space station, to be known as Intelsat 21, at the 58.0° W.L. orbital location. Intelsat is granted authority to operate Intelsat 21 at the 58.0° W.L. orbital location to provide Fixed-Satellite Services in the 3700-4200 MHz (space-to-Earth), 5925-6425 MHz (Earth-to-space), 11.45-11.7 GHz (space-to-Earth), 11.7-12.2 GHz (space-to-Earth) and 14.0-14.5 GHz (Earth-to-space) frequency bands. Intelsat is also authorized to conduct telemetry, tracking, and command operations at 58.0° W.L. using the following center frequencies: 11451.25/11453.25 MHz (space-to-Earth), 11451.75/11453.75 MHz (space-to-Earth), and 13750.5 MHz /13994.5 MHz (Earth-to-space).

SAT-STA-20110304-00050 E S2110 Iridium Constellation LLC

Special Temporary Authority

Grant of Authority

Effective Date: 07/11/2012

On July 11, 2012, the Satellite Division granted, with conditions, special temporary authority to Iridium Constellation LLC for a period 60 days to operate three space stations in its non-geostationary satellite orbit constellation pending action in IBFS File No. SAT-MOD-20080701-00140.

For more information concerning this Notice, contact the Satellite Division at 202-418-0719; TTY 202-418-2555.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Integrity Communications	)	File No. SLD-256241, <i>et al.</i>
(Brooks Consolidated Independent School District)	
Falfurrias, Texas), <i>et al.</i>)	
)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: July 13, 2012

Released: July 13, 2012

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we grant four requests from petitioners² seeking review of decisions by the Universal Service Administrative Company (USAC) denying requests for funding or seeking recovery of funding provided under the E-rate program (more formally known as the schools and libraries universal service support program) for funding years 2001 and 2002 because the applicants failed to show that they had the necessary resources to effectively use the E-rate purchases they sought.³ We find that none of the four applicants fully responded to USAC's requests during selective review to show that they had budgeted for the resources necessary to make effective use of the eligible services they requested.⁴ Based on our review of the facts and circumstances of these specific cases, however, we have

¹ See *Requests for Review of the Decisions of the Universal Service Administrator by Academy of Excellence et al.*, File Nos. SLD-361209, *et al.*, CC Docket No. 02-6, Order, 22 FCC Rcd 8722, 8725-8728, paras. 6-9 (2007) (finding that the petitioners either provided sufficient evidence to demonstrate they had the resources to make effective use of the E-rate services they requested or that they should be given another chance to provide such documentation to USAC); *Requests for Review of the Decisions of the Universal Service Administrator by Chester Upland School District, et al.*, File Nos. SLD-429627, 431150, *et al.*, CC Docket No. 02-6, Order, 23 FCC Rcd 15561, 15564-65 paras. 7-10 (Wireline Comp. Bur. 2008) (granting petitioners another chance to provide USAC with sufficient evidence to demonstrate they had the resources to make effective use of the E-rate services they requested).

² The four applications covered by those requests for review are listed in Appendix A.

³ See Section § 54.504(b)(2)(v) (2001) (requiring applicants to certify that they have secured the necessary funding to use their E-rate services effectively). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

⁴ Integrity contends that the schools at issue, for which it is the service provider, have demonstrated that they had access to adequate resources to make effective use of their E-rate services. Letter from Bill Sugarek, Integrity Communications, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 at 2 (filed Jan. 3, 2002). Lady Liberty also claims that it has provided sufficient documentation to address USAC's data request. Letter from Lady Liberty Academy Charter School to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 at 1 (filed Aug. 21, 2006).

reason to believe that the applicants may not have fully understood the documentation USAC required to complete its review, and thus good cause exists to justify waiver of USAC's filing deadline and allow the applicants listed in Appendix A another opportunity to respond to USAC's requests for further information.⁵ We therefore direct USAC to give those four applicants an additional 30-day opportunity to provide USAC with documentation to show that they had budgeted for all of the resources necessary to make effective use of the eligible services they requested, including the costs of the requisite software and teacher training, such as a completed Item 25 worksheet. Consistent with precedent,⁶ we also waive, for Lady Liberty Academy Charter School, section 54.720 of the Commission's rules, which requires applicants to seek review of a USAC decision within 60 days, because it only missed that filing deadline by three days.⁷ We also dismiss the two appeals listed in Appendix B because the schools at issue subsequently withdrew their funding requests.⁸

2. We therefore remand the underlying applications listed in Appendix A to USAC for further action consistent with this order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of the submitted documentation related to each application listed in Appendix A and issue a funding commitment or denial based on a complete review and analysis no later than 90 calendar days from its receipt of the submitted documentation. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the petitioners' applications.

3. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the requests for review filed by the petitioners listed in Appendix A ARE GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this order.

4. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that section 54.720 of the Commission's rules, 47 C.F.R. § 54.720, IS WAIVED for Lady Liberty Academy Charter School as described herein.

5. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291,

⁵ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WALT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁶ *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by ABC Unified School District, et al., Schools and Libraries Universal Service Support Mechanism*. File Nos. SLD-584091. Order, 26 FCC Rcd 11019, 11019, para. 2 (Wireline Comp. Bur. 2011) (granting petitioners waivers of our filing deadline for appeals because they submitted their appeals to the Commission only a few days late).

⁷ See 47 C.F.R. § 54.720 (requiring appeals to be filed within 60 days of a decision by USAC).

⁸ See Appendix B.

and 1.3 of the Commission's rules. 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the requests for review filed by petitioners listed in Appendix B ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

APPENDIX A**Requests Granted**

Petitioner	Application Number(s)	Funding Year	Date Request for Review/Waiver Filed
Integrity Communications (Encino School Encino, TX)	250073	2001	Jan. 3, 2002
Integrity Communications (Port Isabel Independent School District Port Isabel, TX)	489138	2001	Jan. 3, 2002
Integrity Communications (Premont Independent School District Premont, TX)	651588	2001	Jan. 3, 2002
Lady Liberty Academy Charter School Newark, NJ	307788	2002	Aug. 21, 2006

APPENDIX B**Requests Dismissed**

Petitioner	Application Number(s)	Funding Year	Date Request for Review/Waiver Filed
Integrity Communications (Brooks Consolidated Independent School District Falfurrias, TX)	790089	2001	Jan. 3, 2002
Integrity Communications (Jim Hogg Consolidated Independent School District Hebbronville, TX)	500811	2001	Jan. 3, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Applications of T-Mobile License LLC and) WT Docket No. 12-175
Cellco Partnership d/b/a Verizon Wireless)
For Consent To Assign Licenses)

PROTECTIVE ORDER

Adopted: July 13, 2012

Released: July 13, 2012

By the Senior Deputy Chief, Wireless Telecommunications Bureau:

1. In this Protective Order, we adopt procedures to limit access to proprietary or confidential information that may be filed in this proceeding. We anticipate that such materials will be necessary to develop a more complete record on which to base the Commission's decision. While we are mindful of their sensitive nature, we are also mindful of the right of the public to participate in this proceeding in a meaningful way. We therefore will make such information available to participants in this proceeding, but only pursuant to a protective order. We conclude that the procedures we adopt in this Protective Order give appropriate access to the public while protecting proprietary and confidential information from improper disclosure, and that the procedures thereby serve the public interest.

2. *Definitions.* As used herein, capitalized terms not otherwise defined in this Protective Order shall have the following meanings:

"Acknowledgement" means the Acknowledgement of Confidentiality attached as Appendix A hereto.

"Competitive Decision-Making" means that a person's activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or a business relationship with the Submitting Party.

"Confidential Information" means information that is not otherwise available from publicly available sources and that is subject to protection under FOIA and the Commission's implementing rules.

"Counsel" means In-House Counsel and Outside Counsel of Record.

"In-House Counsel" means an attorney employed by a party to this proceeding or employed by an affiliated entity and who is actively engaged in the conduct of this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

"Outside Counsel of Record" or "Outside Counsel" means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making. The term "Outside Counsel of Record" includes any attorney representing a non-commercial party in this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

"Outside Consultant" means a consultant or expert retained for the purpose of assisting Counsel or a party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term "Outside Consultant" includes any consultant or expert employed by a non-commercial party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.

"Redacted Confidential Document" means a copy of a Stamped Confidential Document where the Confidential Information has been redacted.

"Reviewing Party" means a person who has obtained access to Confidential Information (including Stamped Confidential Documents) pursuant to paragraphs 5 or 8 of this Protective Order.

"Stamped Confidential Document" means any document, or any part thereof, that contains Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WT Docket NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION," unless the Commission determines, *sua sponte* or by request pursuant to sections 0.459 or 0.461 of its rules, that any such document is not entitled to confidential treatment. The term "document" means any written, recorded, electronically stored, or graphic material, whether produced or created by the Submitting Party or another person. By designating a document a "Stamped Confidential Document," a Submitting Party signifies and represents that it contains Confidential Information.

"Submitting Party" means a person who submits a Stamped Confidential Document.

3. *Effect of Designation of Information as Confidential.* By designating documents and information as Confidential under this Protective Order, a Submitting Party will be deemed to have submitted a request that the material not be made routinely available for public inspection under the Commission's rules.¹ Any person wishing to challenge the designation of a document or portion of a document as Confidential must file such a challenge at the Commission and serve it on the Submitting Party. The Submitting Party must file any reply within five business days, and include a justification for treating the information as confidential.² The documents and information challenged will continue to be accorded confidential treatment until the Commission acts on the request and all subsequent appeal and stay proceedings have been exhausted.³ Any decision on whether the materials should be accorded confidential treatment does not constitute a resolution of the merits concerning whether such information would be released publicly by the Commission upon a proper request under our rules implementing the Freedom of Information Act (FOIA).⁴

4. *Submission of Stamped Confidential Documents.* A Submitting Party shall submit to the Secretary's Office one copy of each Stamped Confidential Document it wishes to file, two copies of the Stamped Confidential Document in redacted form and an accompanying cover letter. Each page of the Stamped Confidential Document shall be stamped "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The cover letter also shall contain this legend. Each Redacted Confidential Document shall have the same pagination as the Stamped Confidential Document from which it is derived. The two copies of the Redacted Confidential Document and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." To the extent that any page of the filing contains both Confidential Information and non-confidential information, only the Confidential

¹ See 47 C.F.R. §§ 0.459(a), 0.459(a)(3).

² See 47 C.F.R. § 0.459(b).

³ See 47 C.F.R. § 0.459(g).

⁴ See 47 C.F.R. §§ 0.459(h), 0.461.

Information may be redacted and the page of the unredacted filing shall clearly distinguish the Confidential Information from the non-confidential information. In addition, two copies of each Stamped Confidential Document and the accompanying cover letter must be delivered as directed by Commission staff to John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554.

5. *Procedure for Obtaining Access to Confidential Information.* Any person seeking access to Stamped Confidential Documents and Confidential Information subject to this Protective Order shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of the Protective Order; and file the Acknowledgment with the Bureau, on behalf of the Commission. Such person shall also serve a copy of the Acknowledgment upon the relevant Submitting Party through its Counsel of Record so that it is received at least five business days prior to such person's reviewing or having access to the Submitting Party's Stamped Confidential Documents or Confidential Information, except that, where the person seeking access is one described in either clause 1 or 2 of paragraph 8, the Acknowledgment shall be delivered promptly prior to the person's obtaining access. Each Submitting Party shall have an opportunity to object to the disclosure of its Stamped Confidential Documents or Confidential Information to any such person. A Submitting Party must file any such objection at the Commission and serve it on Counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment (or where the person seeking access is one described in clause 1 or 2 of paragraph 8, filed and serve such objection as promptly as practicable after receipt of the Acknowledgment). *Any person who has previously signed and dated an Acknowledgment to the Protective Order in WT Docket No. 12-4 and served a copy on the relevant Submitting Party and who has been allowed access to such Submitting Party's Highly Confidential Documents need not sign and serve an Acknowledgment in this proceeding; however, a Submitting Party may file an objection to the disclosure of its Confidential Documents in this proceeding to a Reviewing Party before or contemporaneously with filing those documents.* Further, if a Submitting Party files additional Confidential Documents, it must file any objection to the disclosure of those additional Confidential Documents to any Reviewing Party before or contemporaneously with filing those documents. Until any objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access, a person subject to an objection from a Submitting Party shall not have access to the relevant Stamped Confidential Documents or Confidential Information.

6. *Review of Stamped Confidential Documents.* A Submitting Party shall make available for review the Stamped Confidential Documents of such party at the offices of the party's Outside Counsel of Record or, if the Submitting Party does not have Outside Counsel of Record, at the offices of such party's In-House Counsel. A Reviewing Party shall be provided the following alternatives: (1) a Reviewing Party shall be provided adequate opportunity to inspect the documents on site; (2) a Reviewing Party may inspect the documents on site with the ability to request copies, at cost, of some or all of the documents; or (3) a Reviewing Party may request a complete set of the documents at cost, allowing two business days after the request is made for receipt of the copies. If a Reviewing Party plans on requesting a complete set of documents, it is encouraged to make such a request at the time it submits the Acknowledgment to allow it the opportunity to begin reviewing the documents at the end of the five-day period referred to in paragraph 5. All copies of documents that are removed from the Submitting Party's office must be returned or destroyed in accordance with the terms of paragraph 17.

7. *Use of Confidential Information.* Persons obtaining access to Confidential Information (including Stamped Confidential Documents) under this Protective Order shall use the information solely for the preparation and conduct of this proceeding (WT Docket No. 12-175) before the Commission and any subsequent judicial proceeding arising directly from this proceeding and proceeding WT Docket No. 12-4 and any subsequent judicial proceeding arising directly from that proceeding and, except as

provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of any of the Stamped Confidential Documents or Confidential Information in its decision in this proceeding, it will do so by redacting any Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Confidential Information under this Protective Order.

8. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of the Stamped Confidential Documents and Confidential Information with another Reviewing Party and with the Commission and its staff. A Submitting Party's Stamped Confidential Documents and Confidential Information may also be disclosed to employees and Counsel of the Submitting Party. Subject to the requirements of paragraph 5, a Reviewing Party may disclose Stamped Confidential Documents and Confidential Information to: (1) paralegals or other employees of such Reviewing Party assisting them in this proceeding; and (2) employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding.

9. *Filings with the Commission.* A Reviewing Party or a Submitting Party may in any document that it files in this proceeding disclose Confidential Information only if it complies with the following procedure. The party shall submit to the Secretary's Office one copy of the filing containing Confidential Information (the "Confidential Filing"), two copies of the filing in redacted form, *i.e.*, containing no Confidential Information (the "Redacted Confidential Filing"), and an accompanying cover letter. The cover or first page of the Confidential Filing and each page of the Confidential Filing that contains or discloses Confidential Information must be clearly marked "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The cover letter shall also contain this legend. The Confidential Filing shall be made under seal, and will not be placed in the Commission's public file. The two copies of the Redacted Confidential Document and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted Confidential Filing shall state that the Submitting Party is filing a redacted version of the filing. Each Redacted Confidential Filing shall have the same pagination as the Confidential Filing from which it is derived. To the extent that any page of the Confidential Filing contains both Confidential Information and non-confidential information, only the Confidential Information may be redacted and the page of the unredacted Confidential Filing shall clearly distinguish the Confidential Information from the non-confidential information. Two copies of each Confidential Filing and the accompanying cover letter must be delivered as directed by Commission staff to John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554, and one copy must be served on the relevant Submitting Party. Parties should not provide courtesy copies of pleadings containing Confidential Information to Commission staff unless the Bureau so requests, and any such courtesy copies shall be submitted under seal.

10. *Non-Disclosure of Stamped Confidential Documents.* Except with the prior written consent of the Submitting Party, or as provided under this Protective Order, neither a Stamped Confidential Document nor any Confidential Information may be disclosed further.

11. *Protection of Stamped Confidential Documents and Confidential Information.* A Reviewing party shall have the obligation to ensure that access to Stamped Confidential Documents and Confidential Information is strictly limited as prescribed in this Protective Order. A Reviewing Party shall further have the obligation to ensure that Stamped Confidential Documents and Confidential Information are used only as provided in this Protective Order.

12. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside the terms of this Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

13. *Client Consultation.* Nothing in this Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Confidential Documents or Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose Stamped Confidential Documents or Confidential Information.

14. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

15. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency issues a subpoena for or orders the production of Stamped Confidential Documents or Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document or Confidential Information.

16. *Violations of Protective Order.* Should a Reviewing Party violate any of the terms of this Protective Order, such Reviewing Party shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

17. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Parties shall destroy or return to the Submitting Party Stamped Confidential Documents and all copies of the same. No material whatsoever derived from Stamped Confidential Documents may be retained by any person having access thereto, except Counsel may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain Confidential Information, and one copy of orders issued by the Commission or Bureau that contain Confidential Information. All Counsel shall certify compliance with these terms and shall deliver such certification to Counsel for the Submitting Party not more than three weeks after conclusion of this proceeding. The provisions of this paragraph regarding retention of Stamped Confidential Documents and copies of the same and Confidential Information shall not be construed to apply to the Commission or its staff.

18. *Authority.* This Order is issued pursuant to sections 4(i), 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214 and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Senior Deputy Chief, Wireless Telecommunications Bureau

APPENDIX A

Acknowledgment of Confidentiality

WT Docket No. 12-175

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents or Confidential Information except as allowed by the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or Outside Consultant to a party or as a person described in paragraph 8 of the foregoing Protective Order and agree that I will not use such information in any other capacity.

I acknowledge that it is my obligation to ensure that Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Confidential Documents and Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed this ____ day of _____, 2012.

[Name]

[Position]

[Firm]

[Telephone]

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of T-Mobile License LLC and	)	WT Docket No. 12-175
Cellco Partnership d/b/a Verizon Wireless)	
For Consent To Assign Licenses)	

SECOND PROTECTIVE ORDER

Adopted: July 13, 2012

Released: July 13, 2012

By the Senior Deputy Chief, Wireless Telecommunications Bureau:

1. In this Second Protective Order, we adopt procedures to provide more limited access to certain especially competitively sensitive information that may be filed in this proceeding, which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations. We anticipate that such materials will be necessary to develop a more complete record on which to base the Commission's decision. While we are mindful of the highly sensitive nature of such information, we are also mindful of the right of the public to participate in this proceeding in a meaningful way. Therefore, consistent with past practice,¹ we will make such information available to participants in this proceeding, but limit such access to their Outside Counsel of Record, their Outside Consultants and experts whom they retain to assist them in this proceeding, and employees of such Outside Counsel and Outside Consultants. We conclude that the procedures we adopt in this Second Protective Order give appropriate access to the public while protecting especially competitively sensitive information from improper disclosure, and that the procedures thereby serve the public interest.

2. *Definitions.* As used herein, capitalized terms not otherwise defined in this Second Protective Order shall have the following meanings:

"Acknowledgement" means the Acknowledgement of Confidentiality attached as Appendix B hereto.

"Competitive Decision-Making" means that a person's activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party.

"Highly Confidential Information" means information that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission's implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom

¹ See, e.g., Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, *Second Protective Order*, 26 FCC Rcd 6243 (WTB 2011); News Corporation, General Motors Corporation, and Hughes Electronic Corporation, MB Docket No. 03-124, *Order*, 18 FCC Rcd 15198 (MB 2003) (adopting a second protective order).

the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A to this Second Protective Order, as the same may be amended from time to time.

“Outside Counsel of Record” or “Outside Counsel” means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, retained by a party in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making. The term “Outside Counsel of Record” includes any attorney representing a non-commercial party in this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

“Outside Consultant” means a consultant or expert retained for the purpose of assisting Outside Counsel or a party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term “Outside Consultant” includes any consultant or expert employed by a non-commercial party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.

“Outside Firm” means a firm, whether organized as a partnership, limited partnership, limited liability partnership, limited liability company, corporation or otherwise, of Outside Counsel or Outside Consultants.

“Redacted Highly Confidential Document” means a copy of a Stamped Highly Confidential Document where the Highly Confidential Information has been redacted.

“Reviewing Party” means a person who has obtained access to Highly Confidential Information (including Stamped Highly Confidential Documents) pursuant to paragraphs 7 or 11 of this Second Protective Order.

“Stamped Highly Confidential Document” means any document, or any part thereof, that contains Highly Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) “HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN WT DOCKET NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,” unless the Commission determines, *sua sponte* or by request pursuant to sections 0.459 or 0.461 of its rules, that any such document is not entitled to highly confidential or confidential treatment. The term “document” means any written, recorded, electronically stored, or graphic material, whether produced or created by the Submitting Party or another person. By designating a document a “Stamped Highly Confidential Document,” a Submitting Party signifies and represents that it contains Highly Confidential Information.

“Submitting Party” means a person who submits a Stamped Highly Confidential Document.

3. *Designation of Information as Highly Confidential.* Before a Submitting Party may designate documents and information as Highly Confidential, it must receive the written approval of the Commission staff, which, based on the Submitting Party’s representations, will make a preliminary determination whether the proposed designation meets the requirements set forth in this Second Protective Order. A Submitting Party may designate as Highly Confidential only that information described in Appendix A to this Second Protective Order, as the same may be amended from time to time. If a Submitting Party believes that the existing list of descriptions contained in Appendix A should be revised, the Submitting Party shall submit a request to amend Appendix A along with a supporting explanation. If the request is granted, in whole or in part, an amended Appendix A will be issued.

4. *Effect of Designation.* By designating documents and information as Highly Confidential under this Second Protective Order, a Submitting Party will be deemed to have submitted a request that

the material not be made routinely available for public inspection under the Commission's rules.² Any person wishing to challenge the designation of a document or portion of a document as Highly Confidential must file such a challenge at the Commission and serve it on the Submitting Party. The Submitting Party must file any reply within five business days, and include a justification for treating the information as confidential.³ The documents and information challenged will continue to be accorded confidential treatment until the Commission acts on the request and all subsequent appeal and stay proceedings have been exhausted.⁴ Any decision on whether the materials should be accorded confidential treatment does not constitute a resolution of the merits concerning whether such information would be released publicly by the Commission upon a proper request under our rules implementing the Freedom of Information Act (FOIA).⁵

5. *Submission of Stamped Highly Confidential Documents.* A Submitting Party shall submit to the Secretary's Office one copy of each Stamped Highly Confidential Document it wishes to file, two copies of the Redacted Highly Confidential Document in redacted form and an accompanying cover letter. Each page of the Stamped Highly Confidential Document shall be stamped "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN WT DOCKET NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The cover letter also shall contain this legend. Each Redacted Highly Confidential Document shall have the same pagination as the Stamped Highly Confidential Document from which it is derived. The two copies of the Redacted Highly Confidential Document and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." To the extent that any page of the filing contains both Highly Confidential Information or Confidential Information and non-confidential information, only the Highly Confidential Information and Confidential Information may be redacted and the page of the unredacted filing shall clearly distinguish among the Highly Confidential Information, the Confidential Information, and the non-confidential information. In addition, two copies of each Stamped Highly Confidential Document and the accompanying cover letter must be delivered, as directed by Commission staff to John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554.

6. *Copying Sensitive Documents.* If, in the reasonable judgment of the Submitting Party, a document contains information so sensitive that copying of it should be restricted, the Submitting Party may mark the document with the legend "Additional Copying Restricted." Subject to the provisions for access to information in electronic format in paragraph 9, each Outside Firm shall receive only one copy of the document and no more than two additional copies, in any form, shall be made. Further, the Outside Firms hired by any individual party to this proceeding shall collectively hold no more than 15 copies of the document. Application for relief from this restriction against further copying may be made to the Commission, with notice to Counsel of Record for the Submitting Party, which will be granted only for cause.

7. *Procedure for Obtaining Access to Highly Confidential Information.* Access to Stamped Highly Confidential Documents and Highly Confidential Information is limited to Outside Counsel of Record, Outside Consultants, and those employees of Outside Counsel and Outside Consultants described in paragraph 11. Any person seeking access to Stamped Highly Confidential Documents and Highly Confidential Information subject to this Second Protective Order shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this Second Protective Order; and file the Acknowledgment with the Bureau, on behalf of the Commission. Where the person seeking access is Outside Counsel or an Outside Consultant, a copy of the Acknowledgment shall be served upon the

² See 47 C.F.R. §§ 0.459(a), 0.459(a)(3).

³ See 47 C.F.R. § 0.459(b).

⁴ See 47 C.F.R. § 0.459(g).

⁵ See 47 C.F.R. §§ 0.459(h), 0.461.

relevant Submitting Party through its Counsel of Record so that it is received at least five business days prior to such person's reviewing or having access to the Submitting Party's Stamped Highly Confidential Documents or Highly Confidential Information; where the person seeking access is one described in either clause 1 or 2 of paragraph 11, the Acknowledgment shall be served upon the Submitting Party promptly prior to the person's obtaining access. Where there are multiple Submitting Parties, a copy of the Acknowledgment must be served on each Submitting Party within the time periods stated above. Each Submitting Party shall have an opportunity to object to the disclosure of its Stamped Highly Confidential Documents or Highly Confidential Information to any such person. A Submitting Party must file any such objection at the Commission and serve it on Counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment (or where the person seeking access is one described in clause 1 or 2 of paragraph 11, file and serve such objection as promptly as practicable after receipt of the Acknowledgment). *Any person who has previously signed and dated an Acknowledgment to the Second Protective Order in WT Docket No. 12-4 and served a copy on the relevant Submitting Party and who has been allowed access to such Submitting Party's Highly Confidential Documents need not sign and serve an Acknowledgment to the Second Protective Order in this proceeding; however, a Submitting Party may file an objection to the disclosure of its Highly Confidential Documents in this proceeding to a Reviewing Party before or contemporaneously with filing those documents.* Further, if a Submitting Party files additional Highly Confidential Documents, it must file any objection to the disclosure of those additional Highly Confidential Documents to any Reviewing Party before or contemporaneously with filing those documents. Until any objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access, a person subject to an objection from a Submitting Party shall not have access to relevant Stamped Highly Confidential Documents or Highly Confidential Information.

8. *Review of Stamped Highly Confidential Documents.* A Submitting Party shall make available for review the Stamped Highly Confidential Documents of such party at the offices of the party's Outside Counsel of Record. Subject to the terms of paragraph 6, a Reviewing Party shall be provided the following alternatives: (1) a Reviewing Party shall be provided adequate opportunity to inspect the documents on site; (2) a Reviewing Party may inspect the documents on site with the ability to request copies, at cost, of some or all of the documents; or (3) a Reviewing Party may request a complete set of the documents at cost, allowing two business days after the request is made for receipt of the copies. If a Reviewing Party plans on requesting a complete set of documents, it is encouraged to make such a request at the time it submits the Acknowledgment to allow it the opportunity to begin reviewing the documents at the end of the five-day period referred to in paragraph 7. All copies of documents that are removed from the Submitting Party's office must be returned or destroyed in accordance with the terms of paragraph 20.

9. *Review of Highly Confidential Information in Electronic Format.* A Submitting Party shall make available to a Reviewing Party one copy of Highly Confidential Information contained, recorded, or electronically stored on a CD-ROM, DVD, flash drive, portable hard drive or similar electronic storage device, which shall be considered a Stamped Highly Confidential Document. The disk or other medium containing the information in electronic format should be physically sent to the Reviewing Party; a Reviewing Party may not require that it be transmitted electronically. A Reviewing Party may temporarily load onto a computer the information in electronic format. Once loaded onto a computer, any files containing Highly Confidential Information shall be password protected immediately. The Highly Confidential Information may not be stored on a computer after being analyzed. After the analysis is complete, the results of such analysis may be stored by saving the results (but not the original underlying Highly Confidential Information) to a mobile data storage medium, which, if it contains Highly Confidential Information, shall be treated as a Stamped Highly Confidential Document and so marked. All files containing Highly Confidential Information shall be deleted from the computer as soon as

practicable. The original disk or other storage medium shall be stored securely and a record kept of any persons given access to it.

10. *Use of Highly Confidential Information.* Persons obtaining access to Highly Confidential Information (including Stamped Highly Confidential Documents) under this Second Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding *and proceeding WT Docket No. 12-4 and any subsequent judicial proceeding arising directly from that proceeding* and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of any of the Stamped Highly Confidential Documents or Highly Confidential Information in its decision in this proceeding, it will do so by redacting any Highly Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Highly Confidential Information under this Second Protective Order.

11. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of the Stamped Highly Confidential Documents and Highly Confidential Information with another Reviewing Party and with the Commission and its staff. A Submitting Party's Stamped Highly Confidential Documents and Highly Confidential Information may also be disclosed to employees and Counsel of the Submitting Party. Subject to the requirements of paragraph 7, a Reviewing Party may disclose Stamped Highly Confidential Documents and Highly Confidential Information to: (1) paralegals or other employees of such Reviewing Party assisting them in this proceeding; and (2) employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding.

12. *Filings with the Commission.* A Reviewing Party or a Submitting Party may in any document that it files in this proceeding disclose Highly Confidential Information only if it complies with the following procedure. The party shall submit to the Secretary's Office one copy of the filing containing Highly Confidential Information (the "Highly Confidential Filing"), two copies of the filing in redacted form, *i.e.*, containing no Highly Confidential Information (the "Redacted Highly Confidential Filing"), and an accompanying cover letter. The cover or first page of the Highly Confidential Filing and each page of the Highly Confidential Filing that contains or discloses Highly Confidential Information must be clearly marked "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN WT DOCKET NO. 12-175 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The cover letter shall also contain this legend. The Highly Confidential Filing shall be made under seal, and will not be placed in the Commission's public file. The two copies of the Redacted Highly Confidential Filing and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted Highly Confidential Filing shall state that the party is filing a redacted version of the filing. Each Redacted Highly Confidential Filing shall have the same pagination as the Highly Confidential Filing from which it is derived. To the extent that any page of the Highly Confidential Filing contains any type of Confidential Information, only the Confidential Information (of whatever type) may be redacted and the page of the unredacted Confidential Filing shall clearly distinguish among the various types of Confidential Information and the non-confidential information. Two copies of each Highly Confidential Filing and the accompanying cover letter must be delivered, as directed by Commission staff, to John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554, and one copy must be served on the relevant Submitting Party. Parties should not provide courtesy copies of pleadings

containing Highly Confidential Information to Commission staff unless the Bureau so requests, and any such courtesy copies shall be submitted under seal.

13. *Non-Disclosure of Stamped Highly Confidential Documents and Highly Confidential Information.* Except with the prior written consent of the Submitting Party or as provided under this Second Protective Order, neither a Stamped Highly Confidential Document nor any Highly Confidential Information may be disclosed further.

14. *Protection of Stamped Highly Confidential Documents and Highly Confidential Information.* A Reviewing Party shall have the obligation to ensure that access to Stamped Highly Confidential Documents and Highly Confidential Information is strictly limited as prescribed in this Second Protective Order. A Reviewing Party shall further have the obligation to ensure that Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in this Second Protective Order.

15. *Requests for Additional Disclosure.* If any person requests disclosure of Highly Confidential Information outside the terms of this Second Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

16. *Client Consultation.* Nothing in this Second Protective Order shall prevent or otherwise restrict Outside Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Highly Confidential Documents or Highly Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, Outside Counsel shall not disclose Stamped Highly Confidential Documents or Highly Confidential Information.

17. *No Waiver of Confidentiality.* Disclosure of Highly Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Highly Confidential Information. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use Highly Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Highly Confidential Information by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

18. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency issues a subpoena for or orders the production of Stamped Highly Confidential Documents or Highly Confidential Information that a party has obtained under terms of this Second Protective Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Highly Confidential Document or Highly Confidential Information.

19. *Violations of Second Protective Order.* Should a Reviewing Party violate any of the terms of this Second Protective Order, such Reviewing Party shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Highly Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Second Protective Order, including but not limited to suspension or disbarment of Outside Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Highly Confidential Information in this or any other Commission proceeding. Nothing in this Second Protective Order shall limit any other rights and remedies available to

the Submitting Party at law or in equity against any person using Highly Confidential Information in a manner not authorized by this Second Protective Order.

20. *Termination of Proceeding.* The provisions of this Second Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Parties shall destroy or return to the Submitting Party Stamped Highly Confidential Documents and all copies of the same. No material whatsoever derived from Stamped Highly Confidential Documents may be retained by any person having access thereto, except Outside Counsel may retain, under the continuing strictures of this Second Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain Highly Confidential Information, and one copy of orders issued by the Commission or Bureau that contain Highly Confidential Information. All Outside Counsel shall certify compliance with these terms and shall deliver such certification to Outside Counsel for the Submitting Party not more than three weeks after conclusion of this proceeding. The provisions of this paragraph regarding retention of Stamped Highly Confidential Documents and copies of the same and Highly Confidential Information shall not be construed to apply to the Commission or its staff.

21. *Authority.* This Order is issued pursuant to sections 4(i), 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214 and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Senior Deputy Chief, Wireless Telecommunications Bureau

APPENDIX A
Highly Confidential Information and Documents
WT Docket No. 12-175

As specified in paragraphs 2 and 3 of the Second Protective Order, only information and documents set forth in this Appendix and that otherwise meet the definition of Highly Confidential Information or Highly Confidential Documents may be designated as Highly Confidential. This Appendix will be updated as necessary.

1. Information that details the terms and conditions of or strategy related to a Submitting Party's most sensitive contracts (e.g., marketing, service or product agreements, nondisclosure agreements relating to potential mergers and acquisitions, and comparably sensitive contracts).
2. Information that discusses specific steps that will be taken to integrate companies or discussions of specific detail or disaggregated quantification of merger integration benefits or efficiencies (including costs, benefits, timeline, and risks of the integration).
3. Information that discusses in detail current or future plans to compete for a customer or specific groups or types of customers (e.g., business or wholesale customers), including future procurement strategies, pricing strategies, product strategies, advertising or marketing strategies, future business plans, technology implementation or deployment plans and strategies (e.g., engineering capacity planning documents), plans for handling acquired customers, and human resources and staffing strategies.
4. Information that provides granular information about a Submitting Party's current or future costs, revenues, marginal revenues, or market share.
5. Information that provides numbers of customers and revenues broken down by customer type (e.g., business) and market area (e.g., CMA/MSA/RSA, DMA, state, regional cluster) or zip code.
6. Information that discloses the identity or characteristics (including identifying information about specific customer facilities) of specific customers (including their levels of demand) or of those a company is targeting or with whom a company is negotiating.
7. Information that discusses in detail the number or anticipated changes in the number of customers or amount of traffic, including churn rate data, broken down by zip code or market and detailed information about why customers discontinue service.
8. Information that provides detailed or granular engineering capacity information or information about specific facilities, including collocation sites, cell sites, or maps of network facilities.
9. Information that provides detailed technical performance data and test results.

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APPENDIX B

Acknowledgment of Confidentiality

WT Docket No. 12-175

I hereby acknowledge that I have received and read a copy of the foregoing Second Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Second Protective Order and that I shall not disclose or use Stamped Highly Confidential Documents or Highly Confidential Information except as allowed by the Second Protective Order.

I acknowledge that a violation of the Second Protective Order is a violation of an order of the Federal Communications Commission.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Second Protective Order is due solely to my capacity as Outside Counsel or Outside Consultant to a party or as a person described in paragraph 11 of the foregoing Second Protective Order and agree that I will not use such information in any other capacity.

I acknowledge that it is my obligation to ensure that Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Second Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Highly Confidential Documents and Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order or the Second Protective Order.

Executed this ____ day of _____, 2012.

[Name]

[Position]

[Firm]

[Telephone]

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Structure and Practices of the Video Relay Service	)	CG Docket No. 10-51
Program)	
)	
Purple Communications, Inc.)	
)	
Request for Review of the Decision of the)	
TRS Administrator to Withhold TRS Payments)	
)	

**ORDER
{Public Version}**

Adopted: July 13, 2012

Released: July 13, 2012

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

I. In this Order, the Consumer and Governmental Affairs Bureau (Bureau), acting on delegated authority,¹ grants in part and denies in part Purple Communications, Inc.'s (Purple) request for review² of a decision by the Telecommunications Relay Service (TRS) Fund administrator, Rolka Loube Saltzer Associates (Administrator, or RLSA). In that decision, RLSA withheld payment to Purple from the Interstate TRS Fund (TRS Fund) for the provision of Internet Protocol Relay Service (IP Relay) based on its determination that Purple did not comply with the Commission's speed-of-answer (SOA) rule³ on {REDACTED} occasions during the four-month period of July-October 2011.⁴ We find that Purple failed to comply with the Commission's mandatory minimum standard governing speed of answer for TRS calls. Specifically, we reject Purple's assertion that compliance with our SOA rule should be determined using a legal standard of "substantial compliance." We also deny Purple's alternative request for waiver of that rule. Although, consistent with past practice, we direct RLSA to remit to Purple some of the amounts heretofore withheld from reimbursement from the TRS Fund for Purple's provision of IP Relay, we emphasize that, for violations of the SOA rule occurring after the date of release of this order, the Administrator is authorized to withhold payment for the full day's service when the provider fails to meet the minimum SOA threshold on that day.

¹ See generally 47 C.F.R. §§ 0.141, 0.361.

² Purple, Request for Review of the Decision by the TRS Administrator, CG Docket No. 10-51 (filed Jan. 17, 2012) (Request for Review).

³ 47 C.F.R. § 64.604(b)(2) (the SOA rule).

⁴ See *id.* § 64.604(c)(5)(iii)(E), (I).

II. BACKGROUND

2. Under the Commission's SOA rule, IP Relay providers must answer at least 85% of all calls within 10 seconds (the 85/10 standard), with compliance measured on a daily basis.⁵ A provider's compliance with the SOA rule and other mandatory minimum standards set forth in Section 64.604 is a condition precedent for disbursement of TRS Fund payments.⁶ In order to enable the Administrator to determine compliance with the SOA rule, IP Relay providers and other Internet-based TRS providers must submit SOA compliance data with their monthly claims for payment.⁷

3. After reviewing the payment claims and SOA compliance data submitted by Purple for each month of a four-month period from July 2011 through October 2011, RLSA determined that on numerous days of each month Purple did not comply with the SOA rule. Therefore, the Administrator withheld all payment for service for each day on which it found Purple had violated the rule.⁸ Overall, RLSA found that Purple had violated the SOA requirement on {REDACTED} out of the 123 days in the July-October 2011 period. According to Purple, the total TRS Fund compensation withheld from Purple for those {REDACTED} days was \${REDACTED}.⁹

4. On November 7, 2011, Purple sent a letter to RLSA seeking a modification of RLSA's determination that payment must be withheld in full for each day on which there was a violation.¹⁰ On December 22, 2011, after consultation with Commission staff, RLSA denied Purple's request, stating that it had no discretion to modify or waive the rule.¹¹ On January 17, 2012, Purple filed the Request for Review, in which it asks the Commission to overrule the RLSA Letter and reimburse Purple some or all of the total amount withheld for July, August, September, and October 2011.¹²

⁵ 47 C.F.R. § 64.604(b)(2)(ii). A different SOA standard applies to video relay service (VRS) providers. *See id.* § 64.604(b)(2)(iii).

⁶ *See id.* § 64.604(c)(5)(iii)(E) ("The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in § 64.604"). *See also id.* § 64.604(c)(5)(iii)(L).

⁷ *Id.* § 64.604(c)(5)(iii)(D)(3). Prior to September 26, 2011, providers submitted SOA compliance data at the request of the Administrator. *Structure and Practices of the Video Relay Service Program*. Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, 5580, ¶ 74 (2011) (*VRS Practices Order*). Effective September 26, 2011, the Commission codified this obligation in its rules "to make clear that VRS and IP Relay providers must submit such data in order to be compensated from the Fund." *Id.* *See also* 76 FR 59269 (Sept. 26, 2011) (establishing effective date).

⁸ Letter from David Rolka, President, RLSA, to John Goodman, Chief Legal Officer, Purple (December 22, 2011) (RLSA Letter) (attached to the Request for Review as Exhibit D). RLSA initially withheld Purple's entire IP Relay payment for the month of July. Subsequently, RLSA determined that, because compliance is calculated on a daily basis, it would withhold payment for only those days on which Purple failed to meet the 85/10 benchmark. RLSA therefore released payment for those days in July on which the 85/10 standard was met, and it applied the same approach to Purple's August, September, and October payments going forward. *See* Request for Review at 6-7.

⁹ *Id.* at 7. The Bureau's calculation of the amount withheld is \${REDACTED}. *See* ¶ 28 and Appx. B, *infra*.

¹⁰ Request for Review at 8, Exhibit E.

¹¹ RLSA Letter at 2-3.

¹² Request for Review at 21.

III. PURPLE'S REQUEST FOR REVIEW

5. In its Request for Review, Purple argues that RLSA improperly departed from precedent by applying a "strict compliance" standard rather than a "substantial compliance" standard, which Purple asserts has previously governed determinations of SOA compliance.¹³ Purple claims that its July-October 2011 SOA performance substantially complied with the SOA rule and that, accordingly, under a substantial compliance standard, it should have been paid in full.¹⁴ In the alternative, Purple requests that any violations of the SOA requirement be waived for numerous days on which, according to Purple, it experienced unusual, unforeseen "spikes" in call activity.¹⁵ As a further alternative, Purple contends that any withholding of payments should be calculated under the "sliding scale" approach applied by the Consumer and Governmental Affairs Bureau for IP Relay SOA violations in letter rulings issued in January 2008.¹⁶

IV. DISCUSSION

A. Standard of Compliance

1. Applicability of a substantial compliance standard

6. We find Purple's assertion that the Commission has previously applied a "substantial compliance" standard in assessing SOA compliance to be misplaced.¹⁷ As discussed below, the substantial compliance standard cited by Purple was found applicable in *Publix* to an overall eligibility determination made by the Commission under Section 64.604(c)(5)(iii)(F) of the rules.¹⁸ This case, however, involves the quite different context of specific compliance determinations made by the Administrator in deciding whether to grant or withhold payment for specific compensation claims under Section 64.604(c)(5)(iii)(E) and (L).¹⁹ Contrary to Purple's assertions, the Commission has never applied a substantial compliance standard to specific compliance and payment determinations under Section

¹³ *Id.* at 9-15, citing *Publix Network Corp. v. Customer Attendants, LLC*; *Revenue Controls Corp. v. Revenue Controls Corp.*; *SignTel, Inc.*; and *Focus Group, LLC*. Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Red 11487, 11495, ¶ 19 (2002) (*Publix*).

¹⁴ Request for Review at 9-15.

¹⁵ *Id.* at 15-19.

¹⁶ *Id.* at 19-21, citing Letter from Catherine W. Seidel, Chief, Consumer and Governmental Affairs Bureau, to Martin Beaulac, Nordia, Inc. (Jan. 23, 2008) (*Nordia Letter Ruling*) (attached to the Request for Review as Exhibit A); Letter from Catherine W. Seidel, Chief, Consumer and Governmental Affairs Bureau, to Davida Grant, Senior Counsel, AT&T Services, Inc. (Jan. 23, 2008) (*AT&T Letter Ruling*) (attached to the Request for Review as Exhibit B).

¹⁷ Purple begins its argument with a review of appellate law regarding the "manifest injustice" standard for applying a new or changed rule to prior conduct. Request for Review at 9-11. Under this standard, adjudicatory decisions are generally applied retroactively, but prospective-only application may be appropriate if retroactive application of a new or changed rule would result in manifest injustice. See *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). We need not address this argument with respect to the standard of compliance, because, as explained in the text, it is based on the incorrect premise that in requiring full compliance, the Administrator is now applying a "new interpretation of the SOA rule." Request for Review at 13.

¹⁸ 47 C.F.R. § 64.604(c)(5)(iii)(F).

¹⁹ *Id.* § 64.604(c)(5)(iii)(E), (L).

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64.604(c)(5)(iii)(E) or (L). Moreover, the Commission has never found that a substantial compliance standard is applicable to determinations of SOA compliance. In any case, even if such a standard were applicable, we find that Purple has not substantially complied with the SOA rule.

7. In contrast to this case, where we are assessing whether a TRS provider has justified specific claims for TRS payments, the Commission in *Publix* was considering the much broader question of whether certain entities were eligible to receive *any* compensation from the TRS Fund given their record of apparent noncompliance, over time, with numerous applicable provisions of Section 64.604.²⁰ Under the Commission's TRS regulations, in order for a service provider to receive *any* payments from the TRS Fund, the provider must be "eligible."²¹ In *Publix*, the Commission proposed to address the global issue of whether the Publix Companies were "eligible" *at all* for TRS funding, *i.e.*, whether they were "entitled to *any* of the [TRS] fund monies that they requested or received from the TRS Fund."²² In that context, where the Commission was assessing a company's overall record of compliance, over time, with Section 64.604 as a whole, in order to determine whether the carrier should be declared ineligible for TRS funding, the Commission found that a substantial compliance standard should apply because "an insignificant violation" of one provision should not render a provider wholly ineligible to participate in the TRS program.²³

8. The Commission in *Publix*, however, indicated that the substantial compliance standard applied *only* to the global assessment by the administrative law judge (ALJ) of the Publix companies' overall compliance with Section 64.604, *not* to the individual compliance determinations underlying that assessment. For example, the Commission directed the ALJ to examine, as part of its overall eligibility determination, whether the Publix Companies had complied with the requirements to make TRS available 24 hours a day and 7 days a week, met the requirement to have an adequate back-up power source, adhered to the restrictions against recording a telephone call, met the standards governing qualifications and training of communications assistants (CAs), provided equal access to interexchange carriers, and advertised the availability of its facilities to consumers – as well as whether the Companies provided accurate information to the Administrator in support of their payment claims.²⁴ The Commission stated:

The ALJ should determine, using the foregoing principles, whether the Publix Companies' operations were in substantial compliance with the requirements of Section 64.604. To do so, the ALJ should *first make findings on the specific issues* raised below regarding whether and to what extent the Publix Companies met the operational, technical, and functional standards of Section 64.604. *In light of those findings*, the ALJ should *then* determine whether the Publix Companies *substantially complied with Section 64.604 . . .*²⁵

²⁰ See *Publix*, 17 FCC Rcd at 11494, ¶ 18.

²¹ 47 C.F.R. § 64.604(c)(5)(iii)(F).

²² *Publix*, 17 FCC Rcd at 11487, ¶ 1 (emphasis added). In this show-cause proceeding, the Commission also addressed the similarly global issues of whether the Publix Companies' operating authority as common carriers should be revoked and whether they and their principals should be ordered to cease and desist from further common carrier activities. *Id.*

²³ *Id.* at 11494-95, ¶ 19.

²⁴ *Id.* at 11495-99, ¶¶ 20-26.

²⁵ *Id.* at 11495-96, ¶ 20 (emphasis added).

In its instructions to the ALJ regarding the individual compliance determinations, the Commission made no mention of requiring the ALJ to apply a substantial compliance standard to those determinations.

9. In the instant case, the Administrator made a series of *individual* compliance determinations—precisely the type of decision to which the *Publix* substantial compliance standard did *not* apply. That is, the Administrator assessed Purple's compliance, *measured on a daily basis*,²⁶ with a specific provision of Section 64.604, the SOA rule, in order to determine whether to disburse or withhold payment for specific calls for which Purple had submitted a monthly claim for payment. In making such specific determinations, moreover, the Administrator acted pursuant to other provisions of the rules, namely Sections 64.604(c)(5)(iii)(E) and (L), which were not addressed in *Publix*.²⁷ Accordingly, we conclude that there is no conflict with the holding of *Publix*.

10. We also disagree with Purple's assertion that the Commission has previously applied a substantial compliance standard to monthly TRS payment claim determinations. Although Purple contends that the Administrator's payment claim determinations for IP Relay have been governed by a substantial compliance standard "since [IP Relay's] inception,"²⁸ Purple fails to identify a single case in which such a standard was applied to such payment claim determinations. To the contrary, in a letter ruling that Purple itself cites as governing this case (and that Purple attaches to its Request for Review), the Bureau explicitly rejected the provider's "argument that eighty percent or better constitutes 'substantial compliance' with the rule, stating that "[t]he 85/10 rule is specific to the percentage for which compliance can be found."²⁹

11. Thus, even if a substantial compliance standard were relevant in some circumstances, applying such a standard to withholdings for SOA violations would depart from the Bureau's prior decisions. Moreover, such application would be inconsistent with the *Publix* ruling. Although "absolute compliance with each component of the rules may not *always* be necessary to fulfill the purposes of the statute,"³⁰ the requirements at issue in this case are clearly central to the statutory purpose. As the Commission has often stated, the SOA requirements are "a cornerstone of the Commission's TRS rules."³¹ Because "[t]he ability to make a telephone call without delay . . . is fundamental to our concept of a rapid,

²⁶ The SOA rule expressly states that "a TRS provider's compliance with this rule shall be measured on a daily basis," an instruction that is obviously inconsistent with gauging compliance based on a provider's overall performance history. 47 C.F.R. § 64.604(b)(2)(ii).

²⁷ *Id.* § 64.604(c)(5)(iii)(E), (L).

²⁸ Request for Review at 12.

²⁹ *Nordia Letter Ruling* at 4.

³⁰ *Publix*, 17 FCC Rcd at 11495, ¶ 19 (emphasis added).

³¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, 5444, ¶ 6 (2006) (*VRS Declaratory Ruling*), quoting *Telecommunications Services for Hearing-Impaired and Speech Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 13 FCC Rcd 14187, 14207, ¶ 49 (1998) (1998 TRS NPRM); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, 20 FCC Rcd 13165, 13174, ¶ 17 (2005) (*VRS Report and Order*) (stating that speed-of-answer is "one of the fundamental components of ensuring that TRS users have functionally equivalent access to the telephone system").

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efficient. Nationwide communications system,”³² the “ability of a TRS user to reach a CA prepared to place his or her call, without experiencing delays that a voice telephone user would not experience in placing a telephone call, is fundamental to the concept of ‘functional equivalence.’”³³ Therefore, “[a]ny interpretation of our [SOA] rule that delays a customer’s ability to place a call through the relay center clearly compromises the functional equivalence of relay service.”³⁴ In short, full compliance with the SOA rule is indisputably “necessary to fulfill the purposes of the statute.”³⁵

12. Indeed, to interpret the SOA rule as permitting performance below the prescribed 85/10 standard would be at odds with the Commission’s express characterization of this standard as a *mandatory minimum* standard.³⁶ Built into this minimum standard, , which allows as few as 85 percent of calls daily to be answered within 10 seconds, is a performance cushion that allows providers ample margin for error in meeting the functional equivalence mandate of Section 225.³⁷ In this regard, in mandating that abandoned calls be included in calculations of whether providers meet the 85/10 standard, the Commission justified that mandate in part by stating that the 85 percent threshold allows for instances where the call is abandoned for reasons other than SOA.³⁸ Similarly, in requiring that compliance with the 85/10 standard be measured on a daily basis, the Commission specifically rejected the argument that providers needed more leeway “to account for wide daily variations in traffic loads”;³⁹ rather, the Commission concluded that “[t]he burden should be on relay services to manage staffing needs based on

³² *VRS Declaratory Ruling*, 21 FCC Rcd at 5444, quoting 1998 TRS NPRM at 14189, ¶ 3. See also 47 U.S.C. § 225(b)(1) (In order to “make available to all individuals in the United States a rapid, efficient, nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate [TRS] are available, to the extent possible and in the most efficient manner.” to individuals in the United States with hearing disabilities or speech disabilities).

³³ *VRS Declaratory Ruling*, 21 FCC Rcd at 5444, quoting 1998 TRS NPRM, 13 FCC Rcd at 14207, ¶ 49. See 47 U.S.C. § 225(a)(3) (defining TRS as telephone transmission services that enable individuals with hearing or speech disabilities “to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio”) (emphasis added).

³⁴ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5165, ¶ 60 (2000) (2000 TRS Report and Order).

³⁵ *Publix*, 17 FCC Rcd at 11495, ¶ 19. Further underscoring the importance of full compliance with the SOA rule is the Commission’s requirement that VRS and IP Relay providers submit SOA data with their monthly claims for payment, 47 C.F.R. § 64.604(c)(5)(iii)(C). The Commission adopted this requirement “to ensure compliance with this mandatory minimum standard, which is critical to ensuring that [relay] providers promptly answer the calls that come into their centers.” *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, 5580, ¶ 74 (2011).

³⁶ Section 64.604 of the Commission’s rules, which contains the 85/10 standard, see 47 C.F.R. § 64.604(b)(2)(ii), is entitled “Mandatory minimum standards”. If a lower level of performance were permissible, then 85/10 would be neither “mandatory” nor “minimum.”

³⁷ Wireline voice users, by contrast, virtually *always* get an *immediate* dial tone: they do not get a dial tone only 85 percent of the time, nor do they have to wait up to 10 seconds for a dial tone. See, e.g., Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Quality of Service of Incumbent Local Exchange Carriers*, Tables 1(b), (Dec. 2009) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295377A1.pdf> (showing that in 2008, mandatory price cap telephone companies had, at most, negligible amounts of switch downtime).

³⁸ See 2000 TRS Report and Order, 15 FCC Rcd at 5167, ¶ 64.

³⁹ *Id.* at 5166, ¶ 63.

the fluctuations in traffic, not on consumers to tolerate delays in reaching a CA when traffic is high.”⁴⁰ Therefore, to use a “substantial compliance” principle to move the daily compliance threshold *below* the 85/10 standard set by the SOA rule, as Purple advocates, would be inconsistent with the Commission’s clear intent that 85/10 be a *minimum* standard.

13. Finally, even if a substantial compliance standard were applicable to SOA compliance, we do not characterize Purple’s violations in this case as “minor” or “insignificant” deviations.⁴¹ As Purple concedes, it failed to meet the 85/10 benchmark on {REDACTED} out of the 123 days in the July-October 2011 period.⁴² Such pervasive noncompliance cannot reasonably be deemed substantially compliant with the rule.

14. In summary, because the application of a substantial compliance standard to Purple’s SOA violations would depart from the Bureau’s prior decisions, is not compelled by the authority Purple cites to support use of such a standard, and would conflict with the Commission’s own characterization of the SOA rule, we reject Purple’s argument that we should apply such a standard. Moreover, even if a substantial compliance standard did apply, we find that Purple’s pervasive noncompliance in the July-October 2011 period would not satisfy such a standard.

2. Actual vs. Projected Call Volume

15. We also reject Purple’s argument that its compliance with the SOA rule should be assessed with respect to *projected* rather than *actual* call volumes. Pointing out that under the Commission’s rule governing the permissible level of blocked calls, compliance is assessed in relation to projected call volumes, Purple argues that the same approach should apply to measuring compliance with the 85/10 SOA standard.⁴³

16. The 85/10 and blocked call standards are distinct, however. The blocked call provision cited by Purple states:

TRS providers *shall ensure adequate TRS facility staffing* to provide callers with efficient access under *projected calling volumes*, so that the *probability of a busy response* due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.⁴⁴

This blocked call standard does indeed speak in terms of projections and probabilities, rather than actual performance. By contrast, however, the 85/10 SOA standard states that “TRS facilities *shall*, except during network failure, *answer* 85% of all calls within 10 seconds . . .”⁴⁵ Furthermore, as discussed

⁴⁰ *Id.*

⁴¹ *Publix*, 17 FCC Red at 11494-95, ¶ 19.

⁴² Request for Review at 6-7.

⁴³ *Id.* at 5-6, 12-14.

⁴⁴ 47 C.F.R. § 64.604(b)(2)(i) (emphasis added). A virtually identical provision governs the permissible level of call blocking due to congestion of network facilities. *Id.* § 64.604(b)(2)(ii).

⁴⁵ *Id.* § 64.604(b)(2)(ii) (emphasis added). Indeed, the blocked call and 85/10 standards have been separate and distinct since their initial adoption in 1991, and, unlike the blocked call standard, the 85/10 standard has never been expressed as a function of projected call volumes. See *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order (continued....)

above,⁴⁶ in requiring daily measurement of compliance, the Commission rejected the argument that its compliance measurement should “account for wide daily variations in traffic loads,”⁴⁷ stating that “[j]ust like voice calls, TRS calls should be answered within a reasonable time period, regardless of the traffic load.”⁴⁸ In summary, compliance with the 85/10 SOA standard is clearly based on actual daily performance, as opposed to projected traffic loads and probabilities.

B. Waiver of SOA Requirement

17. Purple also argues that the SOA rule should be waived for {REDACTED} days on which, Purple states, the actual call volume exceeded 110% of its forecasted call volume based on a seven-week rolling average of daily call volume.⁴⁹ Purple states that on these days, it “experienced such pronounced and unforeseen call volume as to render it impossible” to comply fully with the SOA rule.⁵⁰

18. Generally, the Commission’s rules may be waived for good cause shown.⁵¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁵² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁵³ Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.⁵⁴ The Commission must take a “hard look” at applications for waiver and must consider all relevant factors when determining if good cause exists.⁵⁵

19. Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.⁵⁶ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁵⁷

20. We find that Purple has failed to meet its burden of proof that a waiver is warranted. As discussed in greater detail below, Purple has failed to demonstrate, or even plead with particularity, facts that would show (1) the actual cause of the variations in call volume that Purple claims rendered it unable

(...continued from previous page)

and Request for Comments. 6 FCC Rcd 4657, 4669 (1991) (*TRS First Report and Order*) (adopting 47 C.F.R. § 64.604(b)(2)).

⁴⁶ See ¶ [12], *supra*.

⁴⁷ 2000 *TRS Report and Order*, 15 FCC Rcd at 5166, ¶ 63.

⁴⁸ *Id.*

⁴⁹ Request for Review at 19.

⁵⁰ *Id.* at 18.

⁵¹ 47 C.F.R. § 1.3.

⁵² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁵³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁵⁴ *Id.*

⁵⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁵⁶ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

⁵⁷ *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1415 (2003).

to comply, (2) why such variations could not have been reasonably projected and addressed through staffing, (3) why fraudulent calling constitutes a special circumstance warranting a waiver of the SOA rule, and (4) why Purple alone, among the IP Relay providers, was unable to avoid pervasive SOA violations.

21. Purple advances a number of factors that, as a general matter, *may* cause unforeseen “spikes” in call volume, including aberrant weather patterns, significant national or global events, and questionable calls.⁵⁸ Purple does not, however, attempt to pinpoint the specific factors that caused the particular call-volume variations for which it requests waivers, other than to state that these so-called “spikes” occurred during a period when Purple’s staffing reflected only projected call volumes, without spikes, because Purple did not realize that the Commission expected full compliance with the SOA rule.⁵⁹ As we have explained above, there has been no change in the standard of compliance, and Purple had no reasonable basis for its assumption that full compliance with the SOA rule was not required.

22. Moreover, we find that Purple has failed to demonstrate that the call volume variations that it experienced in July, August, September, and October 2011 went beyond levels that could have been reasonably projected. Based on historical trends, in which call volume typically fluctuates from month to month, even substantial variations from the average would appear to be foreseeable. As the Commission has previously explained, TRS providers who engage in intelligent planning for network design and CA staffing, consistent with the Commission’s blocked-call standard, should not have difficulty meeting the minimum SOA standard, absent extraordinary circumstances.⁶⁰ Similarly, the Bureau found that “there are providers that operate their IP Relay offerings in a manner such that the 85/10 rule is met despite variations in call volumes.”⁶¹ Yet Purple states, without support, that it was unable to foresee call volume variations a mere 10% higher than the seven-week rolling average.⁶² As the record provides no basis to conclude that the call variations experienced by Purple represent unforeseeable “spikes” exceeding what could be reasonably anticipated, we are not persuaded that such call variations constitute a “special circumstance” weighing in favor of a waiver.

23. As for Purple’s speculation that IP Relay fraud calls may have played a role in the call volume “spikes,”⁶³ the existence of such calls does not in itself present a “special circumstance”

⁵⁸ Request for Review at 16.

⁵⁹ See *id.* at 19; see also *id.* at 18.

⁶⁰ 2000 TRS Report and Order, 15 FCC Rcd at 5167-68, ¶ 65.

⁶¹ Nordia Letter Ruling at 4.

⁶² Purple requests that the SOA rule be waived for any call volume “spike” exceeding 110% of its seven-week rolling average call volume. Purple also provides no explanation or documentation supporting the use of a seven-week rolling average, other than the bald assertions that a seven-week rolling average call volume {REDACTED}. Request for Review at 13 n.29. Purple also does not explain why more than half of the days on which it committed SOA violations were more than seven weeks from the initial date of violation during the period in question. See Table, *infra* ({REDACTED} days of SOA violations from July through October 2011 occurred after {REDACTED}, 2011, which date is seven weeks after {REDACTED}, 2011, the 1st day of violation).

⁶³ Request for Review at 16-17. Apart from the other deficiencies in its request for waiver, Purple failed to provide relevant data regarding the role that it suggests IP relay fraud may have played in Purple’s SOA violations. Although an exhibit prepared by Purple indicates that, during the July-October 2011 period, Purple had a high number of customers whose registrations could not be verified (Request for Review, Exhibit C at 13th unnumbered page). Purple failed to show either the number of minutes used by these unverified customers or how long they were allowed to continue making calls. As the Commission recently explained, even prior to the elimination of the guest user procedure, “providers that have processed calls by unverified users with suspicious names, addresses or

(continued....)

warranting waiver of the SOA rule. All providers of IP Relay have experienced IP Relay fraud, over a period of many years. Fraudulent calls, for example, were cited as a cause of the SOA violations addressed in the 2008 letter rulings attached to Purple's Request for Review, but the Bureau did not deem them sufficient grounds for waiver of the SOA rule.⁶⁴ In the *Nordia Letter Ruling*, the Bureau stated that "IP Relay fraud calls in and of themselves do not present a 'special circumstance' because all providers of IP Relay Service receive 'attacks' of IP Relay fraud. In fact . . . we determined that several [IP Relay] providers were able to meet the 85/10 requirement despite attacks from fraudulent calls."⁶⁵ Similarly, from reviewing the SOA data for all providers of IP Relay, we determined that during the July-October 2011 period for which Purple seeks a waiver of the IP Relay SOA rule, in part based on its handling of fraudulent IP Relay calls, none of the other six IP Relay providers committed pervasive violations of the SOA rule, despite the likely presence of fraudulent calls.⁶⁶

24. Furthermore, granting a waiver in these circumstances would undermine the purpose of the SOA rule, which is to ensure functional equivalence.⁶⁷ As the Commission has explained: "For a TRS user, reaching a CA to place a relay call is the equivalent of picking up a phone and getting a dial tone."⁶⁸ The 85/10 standard, therefore, is not a merely aspirational goal, or a rough benchmark to help providers make staffing decisions. It is a *minimum* standard defining the minimum acceptable level of SOA performance in accordance with the functional equivalence provisions of the Act.⁶⁹

25. In summary, we find no good cause for granting Purple a waiver in these circumstances, and to do so would undermine the purpose of the SOA rule and be contrary to the public interest. Therefore, we deny Purple's request for waiver of the SOA rule.

C. Reimbursement Calculation

26. Purple also requests, in the alternative, that it be partially reimbursed for the days on which it failed to comply with the 85/10 standard, based on the sliding scale approach that the Bureau applied in the *Nordia Letter Ruling* and *AT&T Letter Ruling*.⁷⁰ In those two rulings, as well as in others that the

(...continued from previous page)

questionable calling practices over extended periods of time may be in violation of [their verification obligations]." See *Misuse of Internet Protocol (IP) Relay Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 12-38 and 03-123, FCC 12-71, ¶ 11 n.42 (rel. June 29, 2012). A waiver clearly cannot be justified if the provider's violations are of its own making.

⁶⁴ *Nordia Letter Ruling* at 3-4; *AT&T Letter Ruling* at 4.

⁶⁵ *Nordia Letter Ruling* at 3-4 (footnote omitted).

⁶⁶ See RLSA, *IP Year to Date Speed of Answer Report*, January-December 2011. Three of the other six IP Relay providers were able to avoid any violations of the SOA rule. A fourth provider violated the SOA rule on only two days during the four-month July-October 2011 period. No IP Relay provider, other than Purple, reported any violations of the SOA rule in September or October 2011. *Id.* Nevertheless, like other IP Relay providers, Purple should not have handled, and billed the TRS Fund for, IP Relay calls it knew to be fraudulent.

⁶⁷ *TRS First Report and Order*, 6 FCC Rcd at 4661, ¶ 21 (The 85/10 rule "best meet[s] our goal of providing relay services which are functionally equivalent to voice telephone services"). See also note [33], *supra*.

⁶⁸ *2000 TRS Report and Order*, 15 FCC Rcd at 5165, ¶ 60.

⁶⁹ As noted earlier, Section 64.604 of the Commission's rules, which contains the 85/10 standard, see 47 C.F.R. § 64.604(b)(2)(ii), governs the "mandatory *minimum* standards" (emphasis added) for the provision of the various forms of TRS, including IP Relay.

⁷⁰ Request for Review at 19-21.

Bureau rendered at the same time, the Bureau imposed a graduated, or sliding scale, formula for the subject IP Relay provider to return portions of the TRS Fund reimbursements it had received for days that it missed compliance with the 85/10 standard.⁷¹ The amount that the provider was required to return in those cases increased commensurate with the degree of its noncompliance, and would double for each day after the fifth day of violation in a calendar month.⁷² Moreover, for days on which performance fell below certain SOA thresholds, the percentage of TRS Fund reimbursements that the provider had to return to the TRS Fund doubled no matter how many violations the provider had already had that month, or the provider had to return all of the reimbursements it had received for that day.⁷³

27. Because of the 2008 letter rulings, Purple may not have been on notice that a different approach than the sliding scale would apply in the event of future IP Relay SOA violations. As a result, we will also apply the same formula to the SOA violations at issue here, as well as to any SOA violations that pre-date the effective date of this order. We place all providers on notice, however, that, for violations occurring after the date of this order, the Bureau does not intend to utilize a sliding scale approach with respect to any SOA violations. We conclude that further application of a sliding scale approach to SOA violations that occur after the effective date of this order would no longer serve the public interest. As noted above, the SOA requirements are "a cornerstone of the Commission's TRS rules."⁷⁴ The 85/10 standard is a *minimum* standard defining the minimum acceptable level of SOA performance. Service that falls below this standard is not functionally equivalent to voice service pursuant to the Act; such service is tantamount to service not having been provided at all, and does not merit any reimbursement from the TRS Fund.⁷⁵ We also emphasize that providers committing multiple and/or egregious SOA violations additionally risk incurring penalties and forfeitures in enforcement proceedings pursuant to Section 503 of the Act,⁷⁶ and the Commission may take such violations into account when evaluating a TRS provider's application for Commission certification or re-certification for eligibility for payment from the TRS Fund for the provision of TRS, or whether to suspend or revoke a certification.⁷⁷ Thus, upon further consideration, we no longer believe that it is prudent or necessary to apply a sliding scale in order to maintain a provider's incentive to provide adequate service for the remainder of a day, after failing to meet SOA parameters early that day.⁷⁸

28. Consistent with the above, and, as set forth in Appendix B pursuant to the sliding scale formula described in Appendix A, we calculate that Purple shall be denied reimbursement in the amount

⁷¹ See, e.g., *AT&T Letter Ruling* at 4-5, 8 (Appendix) (showing table of percentages of reimbursements that providers would be required to return).

⁷² See, e.g., *id.* at 5, 8 (Appendix).

⁷³ See, e.g., *id.* at 8 (Appendix).

⁷⁴ See note [31], *supra*.

⁷⁵ Even the sliding scale approach that Purple urges we apply in the alternative recognizes that SOA below a certain threshold is tantamount to no service at all and is not reimbursable from the TRS Fund. See, e.g., *Nordia Letter Ruling* at 5. Whereas, pursuant to the sliding scale approach, 65 percent (or below) of a particular day's call volume being answered within 10 seconds is the threshold for a complete denial of payment from the TRS Fund for that day, as we discuss in the text, going forward we will strictly adhere to the 85 percent SOA performance threshold established by the Commission as the *minimum* standard. See ¶¶ [12, 24], *supra*.

⁷⁶ 47 U.S.C. § 503.

⁷⁷ See, e.g., 47 C.F.R. § 64.606(b)(2) (To be certified as eligible for payment from the TRS Fund, an Internet-based TRS provider must establish that it will meet all non-waived minimum standards); *id.* § 64.606(e)(2) (certification may be suspended or revoked if an Internet-based TRS provider is not in compliance with the minimum standards).

⁷⁸ Cf. Request for Review at 20, quoting *Nordia Letter Ruling* at 5.

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of **§{REDACTED}** for IP Relay service rendered in violation of the Commission's SOA rules during the July-October 2011 time frame. Accordingly, Purple is entitled to a net credit for **§{REDACTED}**, the difference between **§{REDACTED}** and the **§{REDACTED}** withheld by the TRS Fund administrator. Below, we order RLSA, the TRS Fund administrator, to remit to Purple **§{REDACTED}** out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii). The amount remitted is subject to any rights of offset the Commission may have or may assert in the future.⁷⁹ The denial of reimbursement that we order here is separate and apart from any potential action that the Commission, the Bureau, or the Commission's Enforcement Bureau may take against Purple for failure to comply with the Commission's rules.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 5 and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155 and 225, and Sections 0.141, 0.361 and 64.604 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, 64.604, that the Request for Review filed by Purple Communications, Inc. IS GRANTED IN PART AND DENIED IN PART, as provided above.

30. IT IS FURTHER ORDERED that, pursuant Sections 1, 4(i), 4(j), 5, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155 and 225, and pursuant to the authority delegated in Sections 0.141, 0.361, and 64.604 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, and 64.604, Rolka Loube Saltzer Associates, the TRS Fund administrator, SHALL REMIT **§{REDACTED}** to Purple Communications, Inc., out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii), the IP Relay speed of answer rule.

31. IT IS FURTHER ORDERED that, aside from the amounts that we order Rolka Loube Saltzer Associates, the TRS Fund administrator, to remit to Purple Communications, Inc., out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii), Purple Communications, Inc.'s request for remittance by Rolka Loube Saltzer Associates of any other amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii) IS DENIED.

32. This Order shall be effective upon release, in accordance with Section 1.102(b) of the Commission's rules, 47 C.F.R. § 1.102(b).

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau

⁷⁹ See 31 U.S.C. § 3716; 47 C.F.R. § 1.1912.

APPENDIX A

Percentage of Reimbursements to be Denied Purple for IP Relay SOA Violations Through [insert date of release]

% Calls Answered Within 10 Seconds	Cumulative Days Missed Per Month	
	1 st – 5 th Day Missed	Greater than 5 Days Missed
84%	1%	2%
83%	2%	4%
82%	3%	6%
81%	4%	8%
80%	5%	10%
79%	6%	12%
78%	7%	14%
77%	8%	16%
76%	9%	18%
75%	10%	20%
74%	11%	22%
73%	12%	24%
72%	13%	26%
71%	14%	28%
70%	30%	30%
69%	32%	32%
68%	34%	34%
67%	36%	36%
66%	38%	38%
65%	40%	40%
<65%	ALL	ALL

APPENDIX B**Calculation of Reimbursements To Be Denied**

<u>Month</u>	<u>Date</u>	<u>Number of Minutes</u>	<u>Amount of Compensation</u>	<u>SOA Performance</u>	<u>% Denied</u>	<u>Amount Denied</u>
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{TABLE REDACTED}

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter)	
)	
PAGING SYSTEMS, INC.	)	Call Signs KYW912, WHW826, WQA212,
	)	WQA216, WQA221, WQA227
and)	
)	
MARITIME COMMUNICATIONS/LAND	)	Call Sign WRV374
MOBILE LLC)	
)	
Requests to Find Automatic Termination of)	
Licenses)	

ORDER

Adopted: July 13, 2012

Released: July 16, 2012

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us two requests that the above-captioned licenses be found to have terminated automatically for failure to meet applicable coverage requirements. In the first request, Environmental LLC (Environmental) and Skybridge Spectrum Foundation (Skybridge) seek a finding that the licenses of Paging Systems, Inc. (PSI) for Automated Maritime Telecommunications System (AMTS) Stations KYW912, WHW826, WQA212, WQA216, WQA221, and WQA227 terminated.¹ In the second request, Warren Havens, Environmental, Skybridge, and Intelligent Transportation & Monitoring Wireless LLC (collectively, Petitioners) seek a finding that the license of Maritime Communications/Land Mobile LLC (MC/LM) for AMTS Station WRV374² terminated.³ For the reasons stated below, we deny both requests.

2. *Background.* Prior to 2002, AMTS stations were licensed on a site-by-site basis. Section 80.49(a)(3) of the Commission's Rules provided a two-year construction requirement,⁴ and Section 80.475(a) of the Commission's Rules stated that "AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastlines must define a substantial navigational area and show how

¹ Request to recognize automatic termination of Paging Systems, Inc.'s site-based AMTS licenses along the Northeast Corridor blocking Petitioners' co-channel geographic AMTS licensed spectrum including its provision responsive to railroads' request for PTC systems under Congressional mandate (filed October 13, 2011) (October Request). PSI filed an opposition on October 26, 2011. Environmental and Skybridge filed a reply on November 7, 2011.

² The license subsequently was assigned to Maritime Communications/Land Mobile, LLC, Debtor-in-Possession. See FCC File No. 0004851459 (filed August 26, 2011, accepted April 19, 2012).

³ Request to find automatic termination of Maritime Communications/Land Mobile LLC's Site-Based AMTS licenses to serve the Atlantic Coast blocking Petitioners' co-channel geographic AMTS licensed spectrum including its provision responsive to railroads' request for PTC systems under Congressional mandate (filed November 1, 2011) (November Request). Petitioners filed an errata version on November 2, 2011. Citations will be to the errata version. MC/LM filed an opposition on November 17, 2011. Petitioners filed a reply on November 28, 2011.

⁴ See 47 C.F.R. § 80.49(a)(3) (2001).

the proposed system will provide continuity of service for it.”⁵ The above-captioned licenses for site-based AMTS stations at various locations along the Atlantic coast were granted between 1996 and 1998. The licensees notified the Commission that the facilities were constructed and commenced operation between 1998 and 2000.⁶ In 2002, the Commission adopted geographic licensing rules for the AMTS service, and amended Section 80.475(a) to remove the language regarding the continuity of service requirement for site-based applicants.⁷

3. In the instant requests, Petitioners argue that the subject licenses terminated automatically pursuant to Section 1.946(c) of the Commission’s Rules⁸ because they did not satisfy the continuity of service requirement in former Section 80.475(a).⁹ In support of the requests, Petitioners provide engineering analyses concluding that these AMTS systems could not have provided the continuity of coverage because the individual stations’ service contours did not overlap.¹⁰

4. *Discussion.* Section 1.946(c) states,

If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically (in whole or in part as set forth in the service rules), without specific Commission action, on the date the construction or coverage period expires.¹¹

Petitioners argue that because the subject licenses could not have met the continuity of service requirements, their authorizations terminated automatically.¹² The argument is based on the premise that continuity of was a “coverage . . . obligation[.]” for purposes of Section 1.946(c). This premise is flawed.

5. Section 1.946(c) was enacted as part of the Universal Licensing System (ULS) proceeding in 1998.¹³ In this proceeding, the Commission intended, *inter alia*, to establish uniform procedures for using ULS to notify licensees about upcoming construction and coverage deadlines.¹⁴ The Commission did not

⁵ See 47 C.F.R. § 80.475(a) (2001).

⁶ The instant requests generally assume *arguendo* that the stations were constructed as licensed. We note, however, that the question of whether MC/LM’s site-based AMTS stations were properly constructed is pending in a separate proceeding, see *Maritime Communications/Land Mobile, LLC, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, EB Docket No. 11-71, 26 FCC Rcd 6520, 6546 ¶ 61 (2011), and the question of whether PSI constructed Station WQA216 is pending in another proceeding, see *Northeast Utilities Service Co., Order*, 24 FCC Rcd 3310, 3313 ¶ 8 (WTB MD 2009), *recon. pending*. Our decision herein with respect to the instant requests is without prejudice to any determinations in those proceedings.

⁷ See Amendment of the Commission’s Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6696 ¶ 24, 6737 (2002); see also, e.g., Amendment of the Commission’s Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 22400 n.84 (2003).

⁸ 47 C.F.R. § 1.946(c).

⁹ See October Request at 3; November Request at 4.

¹⁰ See October Request at 4-10, Exhs. 1-2; November Request at 7-13, Exh. 1.

¹¹ 47 C.F.R. § 1.946(c); see also 47 C.F.R. § 1.955(a)(2).

¹² See October Request at 12; November Request at 4.

¹³ See Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027 (1998).

¹⁴ See *id.* at 21075 ¶ 103.

intend to change the underlying requirements.¹⁵ In its discussion of the new procedures, the Commission used the term ‘construction requirement’ for site-based stations, and the term ‘coverage requirement’ for geographic licenses.¹⁶ This distinction is clear from the language of the Part 80 rules at issue: Section 80.49(a)(3) provided that the authorization for a facility that was not placed in operation within the required period of time became invalid and had to be returned to the Commission for cancellation,¹⁷ but Section 80.475(a) contained no such language. Thus, for purposes of Section 1.946(c), the relevant requirement with respect to automatic termination is the two-year construction period for each facility, rather than continuity of service.

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155, 303(r), and Section 1.41 of the Commission's Rules, 47 C.F.R. §§ 1.41, the informal request filed by Environmental LLC and Skybridge Spectrum Foundation on October 13, 2011 IS DENIED.

7. IT IS FURTHER ORDERED that the informal request filed by Warren Havens, Environmental LLC, Skybridge Spectrum Foundation, and Intelligent Transportation & Monitoring Wireless LLC on November 1 and 2, 2011 IS DENIED.

8. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

¹⁵ See *id.* at 21075 ¶ 104.

¹⁶ See *id.* at 21074-75 ¶¶ 102-03; see also Clarification of Reconsideration Period and Effective Date for Termination of Wireless Radio Service Authorizations, *Declaratory Ruling*, WT Docket No. 05-23, 20 FCC Rcd 1494, 1494-95 ¶¶ 1-2 (WTB 2005) (referring to “completion of construction” and “satisfaction of coverage requirements,” and stating that “the effective termination date associated with an automatic license termination for all wireless radio service licensees that have construction or coverage performance requirements is the date the construction or coverage period expires”).

¹⁷ See 47 C.F.R. § 80.49(a)(3) (2001).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Equity Communications LP	)	File No.: EB-11-PA-0230
	)	NAL/Acct. No.: 201232400007
Licensee of AM Station WCMC	)	FRN: 0003747813
	)	Facility ID No.: 70259
Wildwood, New Jersey)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 17, 2012

Released: July 17, 2012

By the Acting District Director, Philadelphia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Equity Communications LP (Equity), the licensee of AM Station WCMC in Wildwood, New Jersey (Station), apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules)¹ by failing to enclose the Station's antenna structure (Antenna Structure) within an effective locked fence or other enclosure. We conclude that Equity is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. On October 18, 2011, agents from the Enforcement Bureau's Philadelphia Office inspected the Station's antenna structure located on West 19th Avenue in Wildwood, New Jersey. The agents observed that the Antenna Structure, which is located in a residential neighborhood and has radio frequency potential at its base, was not enclosed by an effective locked fence or other enclosure. Although there were remnants of a fence, the portion of the fence that remained did not restrict access to the base of the antenna structure. The agents immediately contacted the Station's President and General Manager (President), who claimed that a hurricane had washed away a portion of the fence. The agents advised the President to either cease operating the Station until a fence could be installed or install a temporary fence to restrict access to the base of the antenna structure.

3. On October 25, 2011, an agent re-inspected the Antenna Structure and found that the Station was broadcasting and the fence around the antenna structure was in the same condition as it was during the October 18, 2011 inspection. The next day, the agent spoke with Equity's President, who stated that he was in contact with a contractor about installing a fence. The agent reiterated to Equity's President that he should install a temporary fence until a permanent fence can be installed. On October 28, 2011, Equity's President sent an e-mail to the agent, along with photographs, stating that a temporary chain link fence had been installed.

¹ 47 C.F.R. § 73.49.

4. On July 5, 2012, agents conducted a follow-up inspection of the Antenna Structure and observed that Equity had installed a permanent fence.

III. DISCUSSION

5. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.² Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁴ and the Commission has so interpreted the term in the Section 503(b) context.⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁷

A. Failure to Enclose the Antenna Structure Within an Effective Locked Fence

6. Section 73.49 of the Rules states that “[a]ntenna towers having radio frequency potential at the base . . . must be enclosed within effective locked fences or other enclosures.”⁸ Station WCMC’s antenna structure has radio frequency potential at its base. On October 18, 2011, agents found that a substantial portion of the fence that had previously enclosed the Antenna Structure was missing, thereby allowing unrestricted access to the structure’s base. When an agent returned to re-inspect the Antenna Structure on October 25, 2011, the agent found that, notwithstanding the earlier warning to either cease broadcasting or erect a temporary fence, the Station continued to broadcast without a repaired or temporary fence. Based on the evidence before us, we find that Equity apparently willfully and repeatedly violated Section 73.49 of the Rules by failing to enclose the Station’s antenna structure within an effective locked fence or enclosure.

² 47 U.S.C. § 503(b).

³ 47 U.S.C. § 312(f)(1).

⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

⁵ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁸ 47 C.F.R. § 73.49.

B. Proposed Forfeiture Amount

7. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failure to maintain an effective AM tower fence is \$7,000.⁹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁰ After consideration of these factors, we find that a \$3,000 upward adjustment in the base forfeiture amount is warranted. The Philadelphia Office previously issued a Notice of Apparent Liability for Forfeiture to Equity for, *inter alia*, its failure to enclose within effective locked fences the antenna structures used in the operation of another Equity station – AM Station WMID in Atlantic City, New Jersey.¹¹ The fact that Equity previously committed a similar violation and the fact that Equity did not immediately correct the violation at issue here demonstrates a deliberate disregard for the Commission's rules.¹² Accordingly, applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Equity is apparently liable for a total forfeiture in the amount of \$10,000.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314 and 1.80 of the Commission's rules, Equity Communications LP is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violation of Section 73.49 of the Commission's rules.¹³

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Equity Communications LP **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Equity shall also send electronic notification of payment to NER-Response@fcc.gov on the date said payment is made.

11. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁴ When completing the FCC Form 159, enter the Account Number in block number

⁹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁰ 47 U.S.C. § 503(b)(2)(E).

¹¹ See *Equity Communications LP*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 15187 (Enf. Bur. 2011).

¹² We note that we are not using the issuance of the prior NAL to Equity's prejudice as prohibited by Section 504(c) of the Act, 47 U.S.C. § 504(c), but rather are appropriately considering "the underlying facts of a prior violation that shows a pattern of non-complaint behavior." See *Forfeiture Policy Statement*, 12 FCC Rcd at 17103, para. 34; see also *Clean Credit, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 12881 (2010) at para. 7 (using the underlying facts from a prior NAL issued to Clean Credit, Inc. to support an upward adjustment in the proposed forfeiture amount).

¹³ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.49.

¹⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at

(continued....)

23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁵ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.¹⁶ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, One Oxford Valley Building, Suite 404, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047 and include the NAL/Acct. No. referenced in the caption. Equity also shall email the written response to NER-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

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<http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁵ See 47 C.F.R. § 1.1914.

¹⁶ 47 C.F.R. §§ 1.16, 1.80(f)(3).

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Equity Communications LP at 8025 Black Horse Pike, Suite 100-102, West Atlantic City, New Jersey 08232.

FEDERAL COMMUNICATIONS COMMISSION

Kevin Doyle
Acting District Director
Philadelphia District Office
Northeast Region
Enforcement Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
McArthur Bussey	)	File No.: EB-FIELDSCR-12-00000830
	)	NAL/Acct. No.: 201232600015
Fort Lauderdale, Florida	)	FRN: 0021910245
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 16, 2012**Released:** July 16, 2012

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that McArthur Bussey apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating an unlicensed radio transmitter on the frequency 89.1 MHz in Fort Lauderdale, Florida. We conclude that Mr. Bussey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000).

II. BACKGROUND

2. On November 3, 2011, and February 15, 2012, agents from the Enforcement Bureau's Miami Office (Miami Office) used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 89.1 MHz to a residence in Fort Lauderdale, Florida leased by Mr. Bussey. While monitoring the station on November 3, 2011, agents from the Miami Office heard a disc jockey (DJ) identify himself as "Real Deal." On February 15, 2012, the agents determined that the signals being broadcast exceeded the limits for operation under Part 15 of the Commission's rules (Rules),² and therefore required a license. Commission records showed that no authorization was issued to Mr. Bussey or to anyone else for operation of an FM broadcast station at or near this address.

3. An agent from the Miami Office also found information on the Internet connecting Mr. Bussey to the unlicensed station. The "Real Deal" Facebook page contained an advertisement for an after party, which stated "Come Celebrate with DJ Real Deal" over a photograph of "Real Deal" that matched Mr. Bussey's Florida driver's license photograph.³ The advertisement also stated to call Mr. Bussey's phone number "FOR INFO."⁴ The Facebook page for "Real Deal" also listed the webpage for the

¹ 47 U.S.C. § 301.

² Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

³ See Facebook, <http://www.facebook.com/891FM> (last visited Feb. 22, 2012).

⁴ *Id.* See also Lexis Nexis Investigative Portal Homepage, <http://www.lexisnexis.com/government/solutions/investigative/> (last visited (Feb. 22, 2012).

unlicensed station, 891radio.net, as the contact information website.⁵ The domain name, 891radio.net, was registered to Mr. Bussey's leased residence, the location of the unlicensed station.⁶ The unlicensed station's webpage also contained the same photograph of Mr. Bussey as the Facebook page advertisement and stated "Call or Text" Mr. Bussey's phone number.⁷

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁸ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹² The term "repeated" means the commission or omission of such act more than once or for more than one day.¹³

A. Unlicensed Broadcast Operations

5. The evidence in this case is sufficient to establish that Mr. Bussey violated Section 301 of the Act. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.¹⁴ As the record reflects, on November 3, 2011, and February 15, 2012, agents from the Miami Office determined that an unlicensed

⁵ See Facebook, <http://www.facebook.com/891FM> (last visited Feb. 22, 2012).

⁶ See www.networksolutions.com/whois-search/891radio.net (last visited Feb. 22, 2012).

⁷ See <http://www.891radio.net> (last visited June 18, 2012).

⁸ 47 U.S.C. § 503(b).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

¹¹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹² See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹³ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹⁴ 47 U.S.C. § 301.

radio station on the frequency 89.1 MHz operated from Mr. Bussey's leased residence in Fort Lauderdale, Florida. A review of the Commission's records revealed that no license or authorization was issued to anyone to operate a radio station on 89.1 MHz at or near this location. On November 3, 2011, agents from the Miami Office heard a DJ identify himself as "Real Deal" on 89.1 MHz. The Facebook page for "Real Deal" and the unlicensed station's webpage, 891radio.net, contain a photograph of Mr. Bussey and his phone number. In addition, the webpage, 891radio.net, is also registered to Mr. Bussey's leased residence. The totality of the evidence convinces us that Mr. Bussey is DJ "Real Deal" and that he operated the unlicensed station. Because Mr. Bussey consciously operated the station and did so on more than one day, the apparent violation of the Act was both willful and repeated. We therefore conclude, based on the evidence before us, that Mr. Bussey apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.

B. Proposed Forfeiture Amount

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁵ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ We find that the violations here warrant a proposed forfeiture above the base amount. Commission records show that the Miami Office previously issued a *Notice of Unlicensed Operation* to Mr. Bussey for operation of an unlicensed station on the same frequency (i.e., 89.1 MHz) at a different leased residence in Fort Lauderdale, Florida.¹⁷ The fact that Mr. Bussey continued to operate an unlicensed station after being put on notice that his actions contravened the Act, the Commission's rules, and related Commission orders demonstrates a deliberate disregard for the Commission's requirements. Thus, we find that an upward adjustment in the forfeiture amount of \$5,000 is warranted.¹⁸ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Bussey is apparently liable for a forfeiture in the amount of \$15,000.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, McArthur Bussey is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Section 301 of the Rules.¹⁹

8. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture,

¹⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ See *McArthur Bussey*, Notice of Unlicensed Operation (Enf. Bur. rel. Oct. 17, 2008) (on file in EB-08-MA-0146).

¹⁸ See *Robert Brown*, File No. EB-10-BS-0050, Memorandum Opinion and Order, DA 12-929 (Enf. Bur. June 22, 2012), *aff'g*, Forfeiture Order, 26 FCC Rcd 6854 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13740 (Enf. Bur. 2010); *Loyd Morris*, File No. EB-09-BS-0046, Memorandum Opinion and Order, DA 12-930 (Enf. Bur. June 22, 2012), *aff'g*, Forfeiture Order, 26 FCC Rcd 6856 (Enf. Bur. 2011), *aff'g*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13736 (Enf. Bur. 2010).

¹⁹ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

THE OHIO STATE UNIVERSITY
MONTZUMN LIBRARY

McArthur Bussey **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. McArthur Bussey will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 270000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

10. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

11. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617, and include the NAL/Acct. No. referenced in the caption. McArthur Bussey also shall e-mail the written response to SCR-Response@fcc.gov.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²¹ See 47 C.F.R. § 1.1914.

²² 47 C.F.R. §§ 1.16, 1.80(f)(3).

Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to McArthur Bussey at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Stephanie Dabkowski
Resident Agent
Miami Office
South Central Region
Enforcement Bureau

THE OHIO STATE UNIVERSITY
MONTZUM LIPSON



Federal Communications Commission
Washington, D.C. 20554

July 16, 2012

DA 12-1134

Mr. Leonard J. Umina
324 Arabian Drive
Gilbert, AZ 85296

Dear Mr. Umina:

This is in response to the petition dated January 26, 2012 that you filed requesting that the Commission expand its policy of limited preemption of state and local regulations governing amateur station facilities to preempt private land use regulations such as covenants, conditions, and restrictions (CC&Rs) and rental agreements that limit amateur licensees' ability to deploy antennas.¹ Because that policy is codified in the Commission's Rules,² we agree with your characterization of the request as a petition for rulemaking. For the reasons set forth below, we deny the petition.

The Commission has previously addressed the question of whether to preempt CC&Rs in deeds and bylaws that restrict the installation of antennas and associated support structures used by amateur radio stations. In its 1985 *PRB-1* decision, the Commission established a policy of limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures, but expressly decided not to extend its limited preemption policy to CC&Rs in home ownership deeds and condominium bylaws because "[s]uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern the Commission."³ In 2001, the Commission denied a petition requesting that the Commission adopt rules to preempt CC&Rs that do not provide reasonable accommodation for amateur radio operators, and affirmed that the limited preemption policy of *PRB-1* applies only to state and local regulations.⁴ The Commission noted that its decision in *PRB-1* to exclude CC&Rs from its preemption policy was premised upon the fundamental difference between state and local regulations, with which an amateur radio operator must comply, and CC&Rs, which are contractual terms to which the purchaser of a property voluntarily subjects him- or herself.⁵ The

¹ Petition for Rulemaking by Leonard J. Umina (filed February 1, 2012) (Petition). On April 19, 2012, you filed three Supplemental Comments.

² See 47 C.F.R. § 97.15(b).

³ See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities. *Memorandum Opinion and Order*, PRB-1, 101 F.C.C. 2d 952, 960 n.6 (1985).

⁴ See Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, *Memorandum Opinion and Order*, 17 FCC Red 333, 337 ¶ 9 (2001) (*MO&O*), *recon. dismissed*, 17 FCC Red 19408 (WTB PSPWD 2002). Subsequent similar requests for preemption of CC&Rs also have been denied. See, e.g., James Edwin Whedbee, *Letter*, 27 FCC Red 4920 (WTB MD 2012), *recon. pending*; Christopher Kaczmarek, *Letter*, 24 FCC Red 4092 (WTB MD 2009); Don Schellhardt, *Letter*, 22 FCC Red 4025, *aff'd. Letter*, 22 FCC Red 13511 (WTB MD 2007).

⁵ See *MO&O*, 17 FCC Red at 335-37 ¶¶ 6-8.

Leonard J. Umina

Commission also concluded that “there ha[d] not been a sufficient showing that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service.”⁶ It added that, should Congress see fit to enact a statutory directive mandating the expansion of its limited preemption policy to include more than state and local regulations, it would expeditiously act to fulfill its obligation thereunder.⁷

After the instant petition was filed, Congress enacted the Middle Class Tax Relief and Job Creation Act of 2012, which requires the Commission to report to Congress regarding the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief.⁸ The statute requires that the study identify impediments to enhanced Amateur Radio Service communications and recommendations regarding the removal of such impediments, including “the effects of unreasonable or unnecessary private land use restrictions on residential antenna installations.”⁹ Had Congress intended to mandate an expansion of the Commission’s policy at this time, it would have done so directly. We believe that it would be inappropriate and premature for the Commission to consider modifying its policy until after Congress has an opportunity to review the report and decide whether to enact a statutory directive mandating the expansion of the Commission’s limited preemption policy to include more than state and local regulations.¹⁰ We therefore deny the instant petition.

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.401(e) of the Commission’s Rules, 47 C.F.R. § 1.401(e), the petition for rulemaking filed on January 26, 2012 by Leonard J. Umina IS DENIED.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

⁶ *Id.* at 335 ¶ 6. The Commission added, “In this regard, we note that there are other methods amateur radio operators can use to transmit amateur service communications that do not require an antenna installation at their residence. These methods include, among other things, operation of the station at a location other than their residence, mobile operations, and use of a club station.” *Id.*

⁷ *Id.* at 336 ¶ 8.

⁸ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6414 (2012).

⁹ *Id.* at § 6414(b)(2).

¹⁰ See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, GN Docket No. 96-113, 12 FCC Rcd 16802, 16893 ¶ 58 (1997); Competition, Rate Deregulation and the Commission’s Policies Related to the Provision of Cable Television Service, *Report*, MM Docket No. 89-600, 5 FCC Rcd 4962, 4974 ¶ 13 (1990).



Federal Communications Commission
Washington, D.C. 20554

DA 12-1137
July 16, 2012

Michael J. Pearson
222 Hickory Hollow Road
Marshall, AR 72650

Jenna Metznik
Director, Regulatory Compliance
American Tower Corporation
10 Presidential Way
Woburn, MA 01801

Re: Emergency Petition to Compel Compliance
American Towers, LLC
Antenna Structure Registration No. 1281719

Dear Mr. Pearson and Ms. Metznik:

By this letter, the Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau (Bureau) finds that American Towers, LLC (American Towers, or applicant), a subsidiary of American Tower Corporation, has complied with its environmental obligations under the Commission's rules with respect to the above-identified tower. The proposed tower does not fall within a category that routinely requires the preparation of an environmental assessment under section 1.1307(a) or (b) of the Commission rules. We further find that no basis has been established to require American Towers to file an environmental assessment under section 1.1307(c) of the Commission's rules. American Towers therefore may resume construction of this tower.

Background

On April 12, 2012, we received an "Emergency petition to compel compliance" (Petition) from Mr. Michael J. Pearson. The Petition raises several issues concerning Antenna Structure Registration (ASR) No. 1281719, a 314-foot tower registered to American Towers in Marshall, Arkansas. Upon request from the Division, applicant suspended its construction of the tower pending the outcome of this review. On April 23, 2012, American Towers provided to the Commission the environmental materials that it had prepared prior to filing its registration application. On May 15, 2012, Mr. Pearson filed a reply. Below, we address each of the issues that Mr. Pearson has raised in his Petition.

Discussion

Defective Notice. Mr. Pearson charges that American Towers began construction of the tower without providing notice to the public. Mr. Pearson further complains that the ASR application indicates that the tower would be constructed at 144 Cottonwood Lane, whereas the actual site is on Hickory Hollow Road. He also states that the contractors are using unmarked trucks and that the site is unmarked. Applicant has submitted evidence showing that it provided notice in the *Marshall Mountain Wave* on January 12, 19, and 26, 2012, that the tower would be located at 144 Cottonwood Lane, near Marshall, Arkansas. See *Marshall Mountain Wave* Proof of Publication (Jan. 26, 2012).

Given that the rules from the Commission's December 2011 *Order on Remand* (26 FCC Rcd 16700) were not in effect at the time the tower was registered, Applicant was required to provide notice under the Commission's rules only for National Historic Preservation Act Section 106 review under the Nationwide Programmatic Agreement. See Appendix C to Part 1 of the Commission's rules, Section V.B. Applicant's notice in the *Marshall Mountain Wave* met this obligation. Moreover, a map of the area indicates that the tower site is located approximately where Hickory Hollow Road and Cottonwood Lane intersect. Further, Applicant is not obligated to mark either its construction trucks or the site. We therefore deny this part of the Petition.

Environmental Effects. Mr. Pearson alleges that this tower would have significant environmental effects on migratory birds and endangered species. In support of this allegation, Mr. Pearson states: "The new antenna structure is a very short distance in woods and pasture land 4000+ feet from Loafer's Glory Wildlife Management Area and the connecting extensive Buffalo National River Park land making it abundant with birds and other wildlife including many Endangered Species. (250 species of birds, many endangered species, mountain lions, bobcats, black bear, skunks, whitetail deer, beaver, otter, and other species too numerous to mention)."

We find that this assertion does not meet the standard for requesting environmental review under section 1.1307(c) of our rules, which states, "If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth *in detail* the reasons justifying or circumstances necessitating environmental consideration in the decision-making process" (emphasis added).

Mr. Pearson does not identify any endangered species that may be affected by the tower. Instead, he provides a lengthy list of non-endangered species in the area. Further, Mr. Pearson does not provide any basis for why migratory birds may be significantly affected by this particular tower. The proximity to a Wildlife Management Area and relative proximity to the Buffalo National River Park do not, in and of themselves, establish that the tower may have a significant effect on the environment. The Wildlife Management Area is known to contain many of the species Mr. Pearson identifies, but they are not endangered. The proposed site is not located in the Buffalo National River Park, but it is roughly three miles away at its closest point. In addition, contrary to Mr. Pearson's assertion in his May 15, 2012 e-mail, an applicant is not required to identify these nearby features in its environmental analysis. We therefore deny this portion of the Petition.

We also find that based on applicant's pre-application environmental review, which was conducted by Environmental Corporation of America (ECA), an Environmental Assessment would be unnecessary even if Mr. Pearson's allegations had the requisite specificity to state a claim under section 1.1307(c). With respect to endangered species, ECA examined the site for endangered species that are found in Searcy County, and determined that only one species, Royal Catchfly, a state-threatened species, might be present. See Letter from David McGlothlin, Project Manager, and Ben Salter, Senior Reviewer, ECA, to Elyssa Bailey, American Tower (Jan. 26, 2012) (McGlothlin Letter). ECA saw no evidence of this species during its site review, and the relevant Arkansas agencies, the Arkansas Game and Fish Commission and the Arkansas National Heritage Program, did not have any concern that this species would be affected. McGlothlin Letter at 2-3, Table 1. In the absence of specific assertions to the contrary, we find this evaluation sufficient to establish that no EA is necessary for potential effects on endangered species.

With respect to migratory birds, ECA acknowledged the tower would be situated in a migratory flyway, McGlothlin Letter at 3, and would be lit with red-steady lights. However, the tower would be under 450 feet tall and would not use guy wires. According to the Bureau's recently adopted Final Programmatic Environmental Assessment for the Antenna Structure Program, <http://www.fcc.gov/pea> (PEA), "towers with guy wires result in higher levels of avian mortality than towers without guy wires." PEA at 7-1. Further, existing studies have not shown significant avian mortality at towers less than 450 feet tall, even for towers with guy wires. PEA at 5-12 to 5-14.

In addition, ECA determined that the tower site is not in or on a "wetland, waterway, wildlife refuge, national wilderness area, native grassland or forest area, ridge-line, mountain top, coastline or area commonly known to have high incidences of fog or low clouds, where migratory birds may be found." McGlothlin Letter at 3. The PEA identified many of these types of locations as sensitive areas, where a tower is more likely to have a significant effect on migratory birds. PEA at 4-18 to 4-20. Indeed, ECA has satisfactorily addressed all of the areas identified as sensitive in the PEA that could be present at this location.

Based on the record before us, we therefore find that even if Mr. Pearson had met the standard to request an Environmental Assessment under section 1.1307(c), American Tower adequately addressed Mr. Pearson's concerns in its pre-construction environmental review.

Radio frequency (RF) Emissions. Mr. Pearson indicates that he lives 800 feet from the tower site at an elevation of 1250 feet. While he does not mention RF emissions in his letter to the Commission, he does express concerns about the effects of exposure in his attached letter that is addressed to American Towers. Under the Commission's rules, licensees that provide service from the tower will be required to ensure compliance with the limits for maximum permissible exposure (MPE) established by the FCC. These limits have been developed based on guidelines provided by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and the National Council on Radiation Protection and Measurements (NCRP). Both the NCRP and IEEE guidelines were developed by scientists and engineers with a great deal of experience and knowledge in the area of RF biological effects and related issues. Given that there are no antennae currently on the site, it is premature to assert that the RF levels at the site will exceed the applicable MPE limits set forth in the Commission's rules. We therefore deny this aspect of the complaint.

We note that to address concerns about RF exposure from a radio transmitter, the FCC has estimated some worst-case horizontal distances that should be maintained from cellular base station antennas to meet the RF exposure guidelines. These distances can be found in Appendix B of "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance" (http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.pdf). There is no reason to believe that this site will not be in compliance with the FCC's RF exposure limits.

Conclusion

For these reasons, the Division DENIES the Petition. The Division further FINDS that applicant AMERICAN TOWERS, LLC has complied with its obligations under the Commission's environmental rules, and that it therefore may resume construction of this tower.

Sincerely,

Aaron Goldschmidt
Assistant Chief, Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

THE OHIO STATE UNIVERSITY
HONORARY LIBRARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Time Warner Entertainment-Advance/Newhouse	)	File No.: EB-11-KC-0058
Partnership	)	NAL/Acct. No.: 201232560002
	)	FRN: 0003476298
Kansas City, MO	)	Physical ID No.: 004677
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 17, 2012**Released:** July 17, 2012

By the District Director, Kansas City Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Time Warner Entertainment – Advance/Newhouse Partnership (Time Warner), owner of a cable system in Kansas City, Missouri, apparently willfully and repeatedly violated Sections 76.1703 and 76.1704(a) of the Commission's rules (Rules),¹ by failing to maintain and make available required records and data. We conclude that Time Warner is apparently liable for a forfeiture in the amount of twenty five thousand dollars (\$25,000). In addition, we direct Time Warner to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury that it is maintaining the required children's programming records and proof of performance test data.

II. BACKGROUND

2. On July 18, 2011, agents from the Enforcement Bureau's Kansas City Office (Kansas City Office) requested to inspect documents required to be in the public file at Time Warner's office located at 6550 Winchester Avenue, Kansas City during regular business hours.² After an hour of waiting and discussions with eight Time Warner employees, the agents were provided the requested records. The agents observed that the last entry for commercial records for children's programming was dated March 27, 2008, and that proof of performance test data for years 2008 and 2009 were missing.

III. DISCUSSION

3. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.³ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of

¹ 47 C.F.R. §§ 76.1703, 76.1704(a).

² *Id.*

³ 47 U.S.C. § 503(b).

any intent to violate” the law.⁴ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁵ and the Commission has so interpreted the term in the Section 503(b) context.⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁷ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁸

A. Failure to Comply with Children’s Programming and Test Data Recordkeeping Requirements

4. Section 76.1703 of the Rules states: “Cable operators airing children’s programming must maintain records sufficient to verify compliance with § 76.225 and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).”⁹ With respect to this rule, the Commission has clarified, since 1991, that such records must be placed in the cable system’s public file no later than the tenth day of the quarter following the quarter in which the covered programming aired and must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. § 503(b)(6)(B) (one year).¹⁰ Section 76.1704(a) of the Rules states: “The proof of performance tests required by § 76.601 shall be maintained on file at the operator’s local business office for at least five years. The test data shall be made available for inspection by the Commission or the local franchiser, upon request.”¹¹

5. On July 18, 2011, agents from the Kansas City Office requested to inspect Time Warner’s required files at one of its offices in Kansas City during regular business hours. The agents observed that Time Warner’s files were missing the required children’s programming records for five quarters and also the proof of performance tests for 2008 and 2009. There was no evidence that the missing records were ever compiled. Based on the record evidence, we find that Time Warner apparently willfully and repeatedly violated Section 76.1703 of the Rules by failing to maintain required children’s programming records for the first quarter 2010 through first quarter 2011. We further find that Time Warner apparently willfully and repeatedly violated Section 76.1704(a) of the Rules by failing to maintain proof of performance tests for

⁴ 47 U.S.C. § 312(f)(1).

⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁶ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁷ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁹ 47 C.F.R. § 76.1703.

¹⁰ See *Policies and Rules Concerning Children’s Television Programming*, Memorandum Opinion and Order, 6 FCC Rcd 5093, 5097, para. 23 (1991).

¹¹ 47 C.F.R. § 76.1704(a).

2008 and 2009. Finally, we find that Time Warner apparently willfully violated Sections 76.1703 and 76.1704(a) of the Rules by failing to make those required records available to FCC agents at the time of the inspection.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for violating public file rules is \$10,000.¹² In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹³ In similar cases, the Commission recently has imposed the base forfeiture.¹⁴ Because of Time Warner's ability to pay¹⁵ and its prior violations of the rules at issue today,¹⁶ however, we find the appropriate forfeiture amount to be \$25,000. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Time Warner is apparently liable for a total forfeiture in the amount of \$25,000.

7. We further order Time Warner to submit a written statement, pursuant to Section 1.16 of the Rules,¹⁷ signed under penalty of perjury by an officer or director of Time Warner, stating that it is maintaining the required children's programming material and proof of performance tests. This statement must be provided to the Kansas City Office at the address listed in paragraph 10, below, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Time Warner Entertainment – Advance/Newhouse Partnership is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty five thousand dollars (\$25,000) for violations of Sections 76.1703 and 76.1704(a) of the Rules.¹⁸

¹² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹³ 47 U.S.C. § 503(b)(2)(E).

¹⁴ See, e.g., *Southern Media Associates, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 3215 (MB 2012); *Indiana Wesleyan University*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2993 (MB 2012); *Belo TV, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2311 (MB 2012); *Joseph V. Earley*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2166 (MB 2012).

¹⁵ Currently, Time Warner is ranked 103 on the Fortune 500 ranking of American corporations, with reported revenues of more than \$28.9 billion. See <http://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/10472.html> (last visited May 31, 2012).

¹⁶ See *Time Warner Entertainment – Advance/Newhouse Subsidiary, LLC d/b/a Time Warner Cable*, Forfeiture Order, 19 FCC Rcd 10412 (Enf. Bur. 2004) (missing required commercial records on children's programming, proof of performance test data, and signal leakage log and repair records) (forfeiture paid); *Time Warner Cable*, Notice of Violation, EB-09-LA-0088 (Enf. Bur. Jan. 4, 2010).

¹⁷ 47 C.F.R. § 1.16.

¹⁸ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 76.1703, 76.1704(a).

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules,¹⁹ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Time Warner Entertainment – Advance/Newhouse Partnership **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Time Warner Entertainment – Advance/Newhouse Partnership **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Kansas City Office, 520 NE Colbern Road, 2nd Floor, Lee's Summit, MO, 64086. Time Warner shall also e-mail the written statement to SCR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Time Warner Entertainment – Advance/Newhouse Partnership shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

¹⁹ 47 C.F.R. § 1.80.

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²¹ See 47 C.F.R. § 1.1914.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Kansas City Office, 520 NE Colbern Road, 2nd Floor, Lee's Summit, MO, 64081, and include the NAL/Acct. No. referenced in the caption. Time Warner also shall e-mail the written response to SCR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Time Warner Entertainment – Advance/Newhouse Partnership at 13820 Sunrise Valley Drive, Herndon, VA 20171-3000.

FEDERAL COMMUNICATIONS COMMISSION

Ronald D. Ramage
Director
Kansas City Office
South Central Region
Enforcement Bureau

²² 47 C.F.R. §§ 1.16, 1.80(f)(3).



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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TTY: 1-888-835-5322

DA No. 12-1139

July 17, 2012

OFFICE OF ENGINEERING AND TECHNOLOGY

PETITION FOR RULEMAKING FILED

Interested persons may file statements opposing or supporting the Petition for Rulemakings listed herein within 30 days, or as noted. See Sections 1.4 and 1.405 of the Commission's rules for further information.

RM NO.	RULES SEC.	PETITIONER	DATE RECEIVED	NATURE OF PETITION
11666	Part 15	Robert Bosch, LLC	5/15/2012	In the Matter of Amendment of Part 15 of the Commission's Rules to Permit the Operation of Vehicular Radar Systems in the 77-81 GHz Band.

(Christopher D. Imlay
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, D.C. 20904)

FCC

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Joshua M. McMurchie	)	File No.: EB-FIELDWR-12-00003285
	)	NAL/Acct. No.: 201232920002
Prineville, Oregon	)	FRN: 0021913389
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 17, 2012**Released: July 18, 2012**

By the Resident Agent, Portland Resident Agent Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Joshua M. McMurchie apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating an unlicensed radio transmitter on the frequency 97.9 MHz in Prineville, Oregon. We conclude that Mr. McMurchie is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000).

II. BACKGROUND

2. On October 18, 2011, in response to a complaint from a local broadcaster, an agent from the Enforcement Bureau's Portland Resident Agent Office (Portland Office) used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 97.9 MHz to Mr. McMurchie's residence in Prineville, Oregon. The agent determined that the signals on 97.9 MHz exceeded the limits for operation under Part 15 of the Commission's rules (Rules),² and therefore required a license. Commission records showed no authorization issued to Mr. McMurchie or to anyone for operation of a broadcast station at or near this address. Accompanied by a police officer from the Prineville Police Department, the agent inspected the unlicensed radio station and issued a Notice of Unlicensed Operation (NOUO), which was left with another resident at the house.³

¹ 47 U.S.C. § 301.

² Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

³ *Joshua McMurchie*, On-Scene Notice of Unlicensed Operation, issued October 18, 2011 (on file in EB-11-PO-0135). Although the station was in operation, Mr. McMurchie was not at the residence at the time of the inspection. The Portland Office also mailed Mr. McMurchie a formal NOUO, via Certified Mail, Return Receipt Requested, informing him that his operation of an unlicensed broadcast station was in violation of the Act and that such operations must cease immediately. *Joshua McMurchie*, Notice of Unlicensed Operation, issued October 27, 2011 (on file in EB-11-PO-0135). The Portland Office subsequently received the Postal Return Receipt (PS Form 3811) for this NOUO, which was signed by Mr. McMurchie on October 29, 2011.

3. On May 3, 2012, in response to a subsequent complaint, an agent from the Portland Office again used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 97.9 MHz to Mr. McMurchie's residence. The agent determined that the signals on 97.9 MHz exceeded the limits for operation under Part 15 of the Rules,⁴ and therefore required a license. Commission records still showed no authorization issued to Mr. McMurchie or to anyone for operation of a broadcast station at or near this address. Accompanied by a police officer of the Prineville Police Department, the Portland agent inspected Mr. McMurchie's station and again found a broadcast transmitter operating in a room in the residence. Mr. McMurchie acknowledged his operation of the unlicensed radio station on frequency 97.9 MHz to the Portland agent and offered to surrender the transmitter. The agent advised Mr. McMurchie that he had repeatedly violated Section 301 of the Act by operating an unlicensed radio station on frequency 97.9 MHz in Prineville, Oregon.

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁵ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁶ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁷ and the Commission has so interpreted the term in the Section 503(b) context.⁸ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁹ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹⁰

A. Unlicensed Broadcast Operations

5. The evidence in this case is sufficient to establish that Mr. McMurchie violated Section 301 of the Act. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in

⁴ See *supra* note 2.

⁵ 47 U.S.C. § 503(b).

⁶ 47 U.S.C. § 312(f)(1).

⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

⁸ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Red 4387, 4388 (1991), *recons. denied*, 7 FCC Red 3454 (1992).

⁹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Red 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹⁰ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Red at 1362.

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accordance with the Act and with a license granted under the provisions of the Act.¹¹ On October 18, 2011, and May 3, 2012, an unlicensed radio station on the frequency 97.9 MHz was in operation at Mr. McMurchie's residence. On May 3, 2012, Mr. McMurchie admitted to the Portland agent that he owned and operated the unlicensed radio station. A review of the Commission's records revealed that Mr. McMurchie did not have a license to operate a radio station at this location. Because Mr. McMurchie consciously operated the station, and did so on more than one day, the apparent violations of the Act were both willful and repeated. Based on the evidence before us, we find that Mr. McMurchie apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.

B. Proposed Forfeiture Amount

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹² In doing so, we find that the violation warrants a proposed forfeiture above the base amount. The fact that Mr. McMurchie repeatedly operated an unlicensed station when he knew that such actions were unlawful demonstrates a deliberate disregard for the Act and the Commission's requirements. Thus, we find that an additional upward adjustment of \$5,000 in the forfeiture amount is warranted.¹³ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. McMurchie is apparently liable for a total forfeiture in the amount of \$15,000. We further caution Mr. McMurchie that future violations may be subject to more severe enforcement action, including but not limited to larger monetary forfeitures, criminal prosecution, and the *in rem* seizure of his equipment.¹⁴

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Joshua M. McMurchie is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Section 301 of the Act.¹⁵

8. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Joshua M. McMurchie **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Joshua M. McMurchie will also send electronic notification on the date said payment is made to WR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance

¹¹ 47 U.S.C. § 301.

¹² 47 U.S.C. § 503(b)(2)(E).

¹³ See, e.g., *Robert Brown*, Memorandum Opinion and Order, DA 12-929, 2012 WL 2391969 (Enf. Bur. rel. June 22, 2012) (upholding a \$15,000 forfeiture for violations of Section 301); *Lloyd Morris*, Memorandum Opinion and Order, DA 12-930, 2012 WL 2391973 (Enf. Bur. rel. June 22, 2012) (same).

¹⁴ See 47 U.S.C. §§ 401, 501, 503, 510.

¹⁵ 47 U.S.C. § 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

Advice) must be submitted.¹⁶ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

10. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁷ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

11. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.¹⁸ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Portland Resident Agent Office, P.O. Box 61469, Vancouver, Washington 98666-1469, and include the NAL/Acct. No. referenced in the caption. Joshua M. McMurchie also shall e-mail the written response to WR-Response@fcc.gov.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁷ See 47 C.F.R. § 1.1914.

¹⁸ 47 C.F.R. §§ 1.16, 1.80(f)(3).

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13. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail, to Joshua M. McMurchie at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Binh Nguyen
Resident Agent
Portland Resident Agent Office
Western Region
Enforcement Bureau



Federal Communications Commission
Washington, D.C. 20554

July 17, 2012

DA 12-1141
In Reply Refer to:
1800B3-AJR

Bryan Broadcasting Corporation
c/o David D. Oxenford, Esq.
Wilkinson Barker Knauer LLP
2300 N Street, N.W.
Suite 700
Washington, DC 20037

In re: **KWBC(AM), Navasota, Texas**
Facility ID No. 40912
File No. BP-20100712ABU

**Petition for Reconsideration and
Reinstatement**

Dear Counsel:

We have before us a January 9, 2012. "Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*" (the "Petition") filed by Bryan Broadcasting Corporation ("Bryan Broadcasting"), licensee of Station KWBC(AM), Navasota, Texas (the "Station") of the staff's December 6, 2011. action¹ dismissing the referenced application² (the "2010 Application") to change the Station's community of license from Navasota to College Station, Texas. For the reasons discussed below, we reinstate the 2010 Application, grant in part the Petition, and dismiss the Application.

Background. Initially, in AM Auction 84, the staff granted a major modification application³ filed by the former licensee of Station KWBC(AM)⁴ and issued a construction permit (the "2007 Permit"), changing its community of license from Navasota, a small community not located in any Urbanized Area, to College Station, which is one of two central cities of the College Station-Bryan, Texas, Urbanized Area. The 2007 Permit also authorized Station KWBC(AM) to relocate its transmitter site and increase greatly its coverage area. Despite its efforts, Bryan Broadcasting was unable to construct the modified facilities before the expiration of the 2007 Permit on July 11, 2010.⁵ In order to complete construction, Bryan

¹ Letter to Brendan Holland, Esq., Reference 1800B3-JS (MB Dec. 6, 2011) (the "Dismissal Letter").

² See File No. BP-20100712ABU. Notice of the dismissal of this application was given by *Public Notice*, Report No. 47630 (Dec. 9, 2011).

³ See File No. BMJP-20051031ACD (the "2005 Application"). The application was granted on July 11, 2007. See *Public Notice*, Report No. 46528 (Jul. 16, 2007).

⁴ On July 31, 2007, the staff granted an assignment of license application for Station KWBC(AM) from the RAFTT Corporation to Bryan Broadcasting, and the transaction was consummated on August 1, 2007. See File No. BAL-20060405ACK. The assignment was conditioned on the assignor obtaining a community of license change from Navasota to College Station.

⁵ See Bryan Broadcasting's Petition, at 5-6.

Broadcasting filed on July 12, 2010, the 2010 Application, seeking authority for the previously authorized facilities for Station KWBC(AM), including the change of community of license from Navasota to College Station and the relocation of the Station's transmitter site.⁶ On August 3, 2011, the staff sent a letter to Bryan Broadcasting, requesting an amendment to resolve a potential conflict with a Mexican allotment.⁷ On September 1, 2011, Bryan Broadcasting submitted an amendment to address this deficiency.⁸

While the 2010 Application was pending, the Commission revised its policies in cases like this one, requiring greater scrutiny when a station is moving from a rural community to a community located in or near an Urbanized Area and de-emphasizing raw population totals in comparing the gain and loss areas of service.⁹ The new policy generally applies to any application pending on March 3, 2011, the effective date of *Rural Radio*.¹⁰

On December 6, 2011, the staff dismissed the 2010 Application, stating that it could not make the requisite finding that the 2010 Application would result in a preferential arrangement of allotments under the FM allotment priorities.¹¹ Specifically, the staff determined, under Priority 4, that the retention of a second local service to Navasota (population 7,049) outweighs the provision of a seventh local service at College Station (population 93,857).¹² Although the *Dismissal Letter* recognized that the 2010 Application would provide a net gain in reception service to 197,789 persons, it noted the gain and loss areas are well served with five or more full-time reception services and that *Rural Radio* de-emphasized raw population totals under Priority 4.¹³ Accordingly, the staff dismissed the 2010 Application.

In its Petition, Bryan Broadcasting contends that the dismissal of the 2010 Application was in error in three respects. First, Bryan Broadcasting asserts that it was not afforded an opportunity to amend the 2010 Application following the adoption of *Rural Radio* as other similarly situated applicants were

⁶ Although the 2005 Application was granted as a major modification filed in an AM auction window, the 2010 Application was filed as a minor modification due to changes in the Commission's rules for processing community of license changes. See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 112 (2006), *petitions for reconsideration pending* (permitting AM stations to file minor change applications to change their communities of license).

⁷ *Letter to Brendan Holland, Esq.*, Reference 1800B2-JBS (MB Aug. 3, 2011) ("Deficiency Letter").

⁸ See File No. BP-20100712ABU, Amendment of September 1, 2011, Exhibit 1.

⁹ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011), *petitions for reconsideration pending* ("Rural Radio").

¹⁰ See *Rural Radio*, 25 FCC Rcd at 2576, ¶ 30, and at 2578, ¶ 39. However, for equitable reasons, the new policies do not apply to applications for new AM stations or major changes in AM facilities filed in the 2004 AM Auction 84. See *Id.*, at 2575, ¶ 33.

¹¹ *Dismissal Letter* at 2. The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. See *Revision of Assignment Policies and Procedures*, Second Report and Order, 90 FCC 28 88 (1982) ("1982 Revision").

¹² *Dismissal Letter* at 2.

¹³ *Id.*

permitted to do and that this disparate treatment is not permitted under Commission precedent or the Administrative Procedure Act.¹⁴ Second, Bryan Broadcasting argues that the 2010 Application should be grandfathered under the Commission's previous Section 307(b) standards based on various equitable considerations.¹⁵ Third, Bryan Broadcasting alleges that the staff improperly concluded that the 2010 Application would not result in a preferential arrangement of allotments because it relied entirely on the difference in the number of transmission services in Navasota and College Station and did not appropriately consider other factors such as a net gain in reception service to 200,000 listeners, a net gain of 100 people who will receive either a fourth or fifth reception service, and the economic size and growth of the two communities. Accordingly, Bryan Broadcasting requests that the 2010 Application be reinstated *nunc pro tunc* and granted.

Discussion. Reconsideration is warranted only when a petitioner shows a material error in the Commission's original order or raises additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁶ We believe that Bryan Broadcasting has met this burden with respect to one issue but has not done so with respect to the remaining issues.

Disparate Treatment. It is well established that similarly situated parties may not be treated in a disparate manner without an adequate reasoned explanation.¹⁷ An agency must do more than enumerate factual differences but must explain the relevance of those differences to the disparate treatment.¹⁸ Although Bryan Broadcasting was sent a *Deficiency Letter*, we agree that it should have been afforded an opportunity to amend its Section 307(b) showing in view of the adoption of *Rural Radio*. Numerous other similarly situated parties, whose applications were pending on or after the effective date of *Rural Radio*, were sent letters, requesting amendments to their Section 307(b) showings to comply with the revised policies.¹⁹ The *Dismissal Letter* did not acknowledge these contemporaneous cases or attempt to explain a reason for this disparate treatment. Accordingly, we will reinstate the 2010 Application *nunc pro tunc*.

¹⁴ See Bryan Broadcasting's Petition, at 16-18. Simultaneously with the filing of its Petition, Bryan Broadcasting submitted an amendment to the 2010 Application, seeking to provide additional support for its Section 307(b) showing. See File No. BP-20100712ABU, Amendment of January 9, 2012, Exhibit 20.

¹⁵ Specifically, Bryan Broadcasting states that these equitable factors are (1) the 2010 Application essentially seeks to reinstate the 2007 Permit and should be subject to the same grandfathering provisions as apply major change applications that were filed in the 2004 AM auction window and which remain pending; (2) nearly \$475,000 has been spent by Bryan Broadcasting on the acquisition of the Station and expenditures relating to the facility relocation; and (3) it relied upon the advice and guidance of the staff in reapplying for the Station KWBC(AM) city of license modification. See Bryan Broadcasting's Petition at 18-21.

¹⁶ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, 37 FCC 685, 686 (1984), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); and *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975).

¹⁷ See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) ("*Melody Music*"); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987).

¹⁸ See *Melody Music*, 345 F.2d at 732.

¹⁹ See, e.g., *Truth Broadcasting Corp.*, Letter, 27 FCC Rcd 169 (MB 2012); *Sunnylands Broadcasting LLC, et al.*, Letter, DA-12640 (released Apr. 26, 2012), 2012 WL 1454058. Numerous unpublished letters were also to applicants, affording them the opportunity to amend their Section 307(b) showings. See, e.g., *Letter to Karen A. Ross*, Reference 1800B3-RFS (Aug. 25, 2011), File No. BNPED-20110302ACD; *Letter to Sonya Hall Harris, Esq.*, Reference 1800B3-RFS (Aug. 25, 2011), File No. BPH-20110301ABN; *Letter to Jeffrey L. Timmons, Esq.*.

Request for Grandfathering. Next, we consider Bryan Broadcasting's argument that the 2010 Application should be grandfathered under our pre-*Rural Radio* policies. Bryan Broadcasting is in effect requesting waiver of the application of the *Rural Radio* policies to the 2010 Application even though it was pending on the effective date of *Rural Radio* and subject to those new policies.

The Commission's policies or rules may be waived only for good cause shown.²⁰ An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.²¹ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"²² and must support its waiver request with a compelling showing.²³ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.²⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁵ However, waiver of the Commission's policies or rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁶

We find that the equitable concerns raised by Bryan Broadcasting do not meet this burden. First, Bryan Broadcasting contends that the 2010 Application should be processed under the former procedures that were used to process the major change applications filed during the 2004 AM auction because it essentially seeks to reinstate a permit granted during that auction. This argument is not persuasive. The expiration of an AM station construction permit extinguishes all rights to construct and operate the specified facilities. It is simply incorrect to characterize the 2010 Application as an application to "reinstate" an expired permit. Rather, the 2010 Application is subject to the rules and processing policies that are effect at the time that action is taken on this particular application. We reject, as fundamentally inconsistent with our most basic facility licensing policies that any equitable considerations apply to an applicant that files a "successor" application specifying facilities in an expired AM construction permit. For these same reasons we reject the argument that we should waive our processing policy based on Bryan Broadcasting's construction and installation efforts. We note that the 2010 Application proposes to co-locate with the licensed (and previously constructed) facilities of KZNE(AM). Bryan Broadcasting failed to timely complete construction of the equipment necessary to commence diplexed transmissions – including a phasing system and filtering – as specified on the Special Operating Conditions on the 2007 Permit. It has

Reference 1800B3 (Aug. 30, 2011). File No. BPH-20070119AEI; and *Letter to Lawrence Bernstein, Esq.*, Reference 1800B3-RFS (Aug. 25, 2011). File No. BPH-20090121AAL.

²⁰ 47 C.F.R. § 1.3.

²¹ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

²² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). *aff'd.*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("*WAIT Radio*"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

²³ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

²⁵ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁶ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

also failed to explain why its inability to timely complete construction was based on circumstances beyond its control.

In addition, we find that Bryan's request to broaden the class of Auction 84-related applications that should be processed under former processing policies is a general policy issue that is more properly raised in a Petition for Reconsideration²⁷ in the *Rural Radio* proceeding rather than as an equitable ground for a waiver.²⁸ Although the Commission could have extended its grandfathering of AM applications filed during Auction 84 to situations where parties filed "successor" applications specifying the same facilities as those authorized in an expired Auction 84 construction permit, it did not do so. The Commission concluded that a grandfathering exception was warranted only for applications that remained pending from the 2004 window. It reasoned that it was likely that these applicants had invested considerable resources on prosecuting their applications, exploring technical and settlement options, etc.²⁹ Those considerations are not present here. It is also the case that the 2010 Application, unlike the Auction 84 submissions, was filed after the 2009 release of the *Rural Radio* notice of proposed rule making.³⁰ Thus, Bryan Broadcasting had full notice that the 2010 Application could be subject to a new processing standard.

We find particularly unpersuasive Bryan Broadcasting's argument that a waiver is warranted due to funds it expending in acquiring the Station. *Rural Radio* did not affect in any way the KWBC(AM) license or Bryan Broadcasting's authority to timely construct and commence operations as specified in the 2007 Permit. In acquiring a station with an outstanding construction permit Bryan Broadcasting assumed the risk that it would be able to complete construction by the 2007 Permit's construction deadline, a deadline that was subject to the Commission strict timely construction policy. Finally, Bryan Broadcasting's allegation that it relied upon informal staff advice in reapplying for the Station KWBC(AM) license modification does not warrant waiving application of the *Rural Radio* policies because it is well settled that informal staff advice is not authoritative and that a licensee assumes the risk of relying on such advice.³¹

Preferential Arrangement of Allotments. Finally, we examine Bryan Broadcasting's amended Section 307(b) showing *de novo* to determine whether it would result in a preferential arrangement of

²⁷ Although Bryan Broadcasting did not file such a petition for reconsideration, it participated in a joint opposition to petition for reconsideration which, in part, questioned the scope of the grandfathering provision. See *Opposition to Petition for Reconsideration of Educational Media Foundation and Bryan Broadcasting Corporation*, MB Docket 09-52 (filed Jan. 5, 2012).

²⁸ See *Adelphi Communications Corporation and Time-Warner Cable, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8288, ¶ 192 (2006) (finding that some of the concerns regarding a proposed transfer of control are not transaction-specific and are more appropriately addressed in other pending rule making proceedings); *Birmingham Christian Radio, Inc. and Radio South Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7909, 7915, ¶ 19 (determining that a party's generalized arguments challenging an interim policy on defining the relevant product market are more appropriately addressed in the context of the local ownership rule making proceeding); and *Sunburst Media L.P. and Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368, ¶ 6 (2002) (concluding that a party's request to change our policy with respect to network affiliation agreements is more appropriately addressed in a rule making proceeding).

²⁹ See *Rural Radio*, 26 FCC Rcd at 2575, ¶ 33.

³⁰ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009).

³¹ See, e.g., *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991); *David D. Oxenford, Esq.*, Letter, 26 FCC Rcd 392, 397 (MB 2011); *State of Oregon*, Memorandum Opinion and Order, 11 FCC Rcd 1843 (1996).

allotments. At the outset, the *Deficiency Letter* properly determined that both the existing and proposed arrangement of allotments should be compared under Priority 4 because the higher allotment priorities do not apply.³² The *Deficiency Letter* also recognized that, under Priority 4, the Commission traditionally considers various factors such as “the number of aural reception services received in the proposed service area, the number of local transmission services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities.”³³ Recently, the Commission added some additional factors under Priority 4.³⁴ Of the various factors, we find that two are most relevant in this case.

First, we believe that a comparison of the number of transmission services strongly favors retention of the Station in Navasota. Although the *Dismissal Letter* found that retention of a second transmission service at Navasota is preferred over the provision of a seventh transmission service to College Station, the appropriate comparison should be the retention of a second local service at Navasota versus the allotment of a twelfth transmission service to the College Station-Bryan Urbanized Area because, under our revised policies, a move to a community located within an Urbanized Area is considered to be an additional transmission service to the Urbanized Area rather than a transmission service to the particular community.³⁵ Viewed in this light, the retention of a second transmission and a first commercial service to a community of 7,049 persons is favored over a twelfth transmission service to the College Station-Bryan Urbanized Area.³⁶

³² *Dismissal Letter*, at 2.

³³ 1982 Revision, 88 FCC 2d at 92 n.8.

³⁴ These new factors include, *inter alia*, (1) requiring applicants to show not only the size of the populations gaining and losing service but also the numbers of services those persons would receive if the proposal were granted; (2) strongly disfavoring any change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station’s current protected contour; (3) strongly disfavoring any proposed removal of a second local transmission service from a community with a population of 7,500 or greater; or (4) any other changes in circumstances relevant to our consideration. See *Rural Radio*, 26 FCC Rcd at 2578-79, ¶ 39.

³⁵ *Id.*, at 2567, ¶ 20 (adopting a rebuttable presumption “that, when the community proposed is located in an urbanized area or could, through a minor modification application, cover more than 50 percent of an urbanized area, we will treat the application, for Section 307(b) purposes, as proposing service to the entire urbanized area rather than the named community of license”). See also *Gearhart, Madras, et al.*, Report and Order, 26 FCC Rcd 10259 (MB 2011) (determining that the appropriate comparison under Priority 4 for a proposed modification of a station’s license between two communities within the same urbanized area is from which community would the station be able to better serve the urbanized area rather than examining the transmission service needs of the two communities).

³⁶ See *Dismissal Letter*, at 2, citing *Sumter, Orangeburg, and Columbia, South Carolina*, Report and Order, 11 FCC Rcd 6376 (MMB 1996) (finding that retention of sixth transmission service at a smaller community outweighed fourteenth transmission service at a larger community); and *Metropolis, Illinois, and Paducah, Kentucky*, Report and Order, 15 FCC Rcd 11714, 11715 (MMB 2000) (determining that retention of third transmission service at a smaller community outweighed sixth transmission service at a larger community). Bryan Broadcasting claims that those cases are inapposite to the present situation because they did not involve a change of transmitter site or an improvement in the station’s coverage. See *Bryan Broadcasting’s Petition* at 11. We disagree. We have reached similar results under Priority 4 where the proposed reallocations would provide a net gain of service. See, e.g., *Royston and Commerce, Georgia*, Report and Order, 15 FCC Rcd 5676 (MMB 2000); *Bay Springs, Ellisville, and Sandersville, Mississippi*, Report and Order, 14 FCC Rcd 21339 (MMB 1999).

Second, the net gain in service to approximately 212,000 persons³⁷ resulting from the proposal and a comparison of the number of reception services in the gain and loss areas support reallocation of the Station to the College Station-Bryan Urbanized Area. Although the gain and loss areas are generally well served as they have more than five reception services,³⁸ Bryan Broadcasting claims that, in relative terms, the gain area needs the additional service more than the loss area because the gain area has fewer services. Specifically, Bryan Broadcasting alleges that the loss area will continue to receive service from a minimum of 17 radio stations. By way of contrast, Bryan Broadcasting claims that “[t]he improvement of KWBC will bring service to more people who currently receive less than 10 services than are in the entire loss area.”³⁹

Overall, we find that, on balance, the substantial disparity in the number of transmission services between Navasota and the College Station-Bryan Urbanized Area is controlling and that the public interest would be better served by retaining Station KWBC(AM) as a second transmission service and a first commercial service to Navasota than reallocating it as a twelfth transmission service to the College Station-Bryan Urbanized Area. Although the proposed reallocation would result in a net gain of service to approximately 212,000 people, we do not find this to be as significant a factor because both the gain and loss areas are extremely well served as they have well in excess of five reception services that the Commission has deemed to be “well served.” Further, it is important to consider that this case involves a proposed “move-in” to an urbanized area and that our revised Section 307(b) policies under *Rural Radio* are intended to “achieve a balance between distribution of radio service to the largest populations on the one hand and distribution of new service to those most in need of it on the other.” Under these circumstances, if we were to approve this type of reallocation, we would be allowing a move-in to an urbanized area based on a net gain of service to well served populations, who in relative terms, have fewer services than other well served populations. Such a result would be antithetical to the service goals which *Rural Radio* is intended to promote. Finally, while there are some other factors mentioned by Bryan Broadcasting, we do not believe that they overcome the importance of the factors supporting the existing arrangement of allotments.⁴⁰ Accordingly, we conclude that retention of Station KWBC(AM) at Navasota would better serve the public interest than its reallocation to the College Station-Bryan Urbanized Area.

³⁷ Specifically, a staff engineering analysis reveals that the proposal would result in a gain of service to 239,848 persons, and a loss of service to 27,461 persons, for a net gain of 212,387 persons. While Bryan Broadcasting’s figures are different from the staff’s analysis, they show a net increase of approximately 200,000 persons.

³⁸ According to Bryan Broadcasting’s engineering study, there would be a net gain of over 100 persons who would receive either a fourth or fifth reception service, while a staff engineering analysis reveals that there would be a net loss of 114 persons who would receive a fourth or fifth service. However, whether there is a net gain or loss of third, fourth, or fifth reception services to 100 or 114 persons is not decisionally significant in this case because these figures are well below 15 percent of the population in the existing protected contour. See *Rural Radio*, 26 FCC Rcd at 2577.

³⁹ Bryan Broadcasting’s Petition, at 12-13. To further support this position, Bryan Broadcasting submitted an engineering study, calculating the Service Value Index (“SVI”) for the gain and loss areas and showing that the SVI for the gain area is nearly 46 times as the SVI for the loss area. Specifically, Bryan Broadcasting claims that the SVI for the gain area is 9,667, and the SVI for the loss area is 211. *Id.*

⁴⁰ Specifically, Bryan Broadcasting states that between 2000 and 2010, the populations for Navasota and College Station grew by approximately 4 percent and 38 percent respectively and that in the past eight years, annual gross retail sales increased by 50 percent in College Station and declined by 20 percent in Navasota but did not provide population and economic growth information comparing Navasota and the College Station-Bryan, Texas, Urbanized Area. Additionally, while Bryan Broadcasting contends that Navasota cannot support two local stations, this allegation is based upon the opinion of one of its principals and is not supported. See Bryan Broadcasting’s Petition at 15.

Conclusion. Accordingly, for the reasons set forth above, the “Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*” filed by Bryan Broadcasting Corporation IS GRANTED IN PART, and in all other respects IS DENIED. Further, the application (File No. BP-20100712ABU) filed by Bryan Broadcasting Corporation IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
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DA 12-1143

July 17, 2012

Enforcement Advisory No. 2012-04

FCC ENFORCEMENT ADVISORY

ENFORCEMENT BUREAU REPORTS ON CABLE AND SATELLITE COMPLIANCE WITH CHILDREN'S PROGRAMMING REQUIREMENTS UNDER THE CHILDREN'S TELEVISION ACT AND ASSOCIATED PUBLIC FILE RULES

In this Enforcement Advisory, the Enforcement Bureau (Bureau) reports on its review of cable and satellite compliance to ensure that programming targeted to children meets the requirements of the Children's Television Act of 1990 (CTA).¹ Compliance with these requirements is important in light of the significant role that television plays in the lives of American children.² Although we found that cable and satellite providers generally complied with the limits on commercial material during children's programming, several providers failed to update their public inspection files in a timely manner. With that in mind, this Advisory reminds cable and satellite operators of their obligations associated with the transmission of children's programming.

In passing the CTA, Congress found that special safeguards are appropriate to protect children from over-commercialization on television.³ To provide such safeguards, the CTA and the FCC's rules limit the amount of commercial matter in children's programming and require the maintenance of records documenting compliance. These rules, covering programming targeted to children ages 12 years old and younger, apply to television broadcasters,⁴ cable operators,⁵ and direct broadcast satellite systems.⁶ In particular, commercial matter transmitted during children's programming must not exceed 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Additionally, broadcasters, cable operators,

¹ Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394 (*Children's Television Act of 1990*).

² See *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 22943, 22945, para. 3 (2004). See also U.S. General Accounting Office, *Children's Television Act: FCC Could Improve Efforts to Oversee Enforcement and Provide Public Information* 1 (July 14, 2011). The report reiterated the importance of the CTA and the associated rules.

³ See *Children's Television Act of 1990*, *supra* note 1.

⁴ See 47 C.F.R. §§ 73.670, 73.3526(c)(11)(ii).

⁵ See 47 C.F.R. §§ 76.225, 76.1703.

⁶ See 47 C.F.R. § 25.701(e).

and satellite systems that air children's programming must maintain records sufficient to verify their compliance with the advertising restrictions and make such records available to the public.⁷

As part of our regular activities to monitor compliance with children's programming rules applicable to cable and satellite operators, last year the Bureau initiated a review of children's programming on cable and satellite systems in communities across the country. Bureau field agents and headquarters employees recorded and reviewed programming from several children's programming networks on numerous cable and satellite systems, focusing on programming aimed at children 12 and under. The programming was analyzed for compliance with commercial limits as well as the prohibitions on host selling,⁸ program-length commercials, and the display of commercial website Internet addresses.⁹ Bureau field agents also inspected the public files of cable and satellite systems across the country to assess compliance with relevant recordkeeping requirements.

The Bureau's investigation and analysis found that cable and satellite compliance with the CTA requirements was generally good. The Bureau's review of children's programming material revealed no violations of the limits on commercial matter. In addition, our investigation and review of operators' public files found that the vast majority maintained documents to sufficiently verify compliance with the rules and made these files available to the public.

Despite widespread compliance, however, we found some apparent violations of the public file requirements. Over one-third of the public file inspections revealed either missing or late-filed Children's Programming Reports. We remind cable and satellite operators that these reports must be placed in the public inspection file within 10 days of the end of each quarter.¹⁰

To address these apparent violations of the Public File rules, we are releasing the following Notice of Apparent Liability (NAL) and Notices of Violation (NOVs) concurrent with this Enforcement Advisory:

CCO SOCIAL I, LLC, Gilroy, California; Notice of Violation, EB-11-SF-0117
Cebridge Acquisition, LP, Bryan, Texas; Notice of Violation, EB-11-HU-0053
Charter Communications, Inc., Athens, Georgia; Notice of Violation, EB-11-AT-0087
Charter Communications, Inc., Fort Worth, Texas; Notice of Violation, EB-11-DL-0061
Comcast of Howard County, Inc., Elkridge, Maryland; Notice of Violation, EB-11-CF-0093
Comcast of Illinois XI LLC, Mount Prospect, Illinois; Notice of Violation, EB-11-CG-0248
Cox Communications Louisiana LLC, Baton Rouge, Louisiana; Notice of Violation, EB-11-OR-0074
DirecTV, Inc., El Segundo, California; Notice of Violation, EB-11-LA-0176
DISH Network, LLC, Englewood, Colorado; Notice of Violation, EB-11-DV-0201

⁷ See 47 C.F.R. §§ 73.3526(e)(11)(ii), 76.1703, 25.701(e)(3). See also *Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2113, para. 13 (1991), *recons. granted in part*, 6 FCC Rcd 5093, 5098, para. 28 (1991); *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Order on Reconsideration of First Report and Order, 19 FCC Rcd 5647, 5668, para. 48 (2004) (2004 Second Order).

⁸ The Commission's "host-selling policy" prohibits the use of program talent or other identifiable program character to deliver commercials during or adjacent to children's programming featuring that character.

⁹ See 47 C.F.R. §§ 76.225, 25.701(e).

¹⁰ See *Policies and Rules Concerning Children's Television Programming*, Memorandum Opinion and Order, 6 FCC Rcd 5093, 5097, para. 23 (1991) (1991 MO&O); 2004 Second Order, 19 FCC Rcd at 5668, para. 48. See also 47 C.F.R. § 1.80(b)(4).

Time Warner Entertainment, Advance/Newhouse Partnership, Kansas City, Missouri; Notice of Apparent Liability for Forfeiture and Order, EB-11-KC-0058
Verizon Florida LLC, Hillsborough County, Florida; Notice of Violation, EB-11-TP-0051

The NAL finds Time Warner Entertainment – Advance/Newhouse Partnership (Time Warner) apparently liable for a forfeiture in the amount of twenty five thousand dollars (\$25,000) for violations of Sections 76.1703 and 76.1704 of the Commission's rules.¹¹ The Enforcement Bureau's Kansas City field agents inspected files at Time Warner's offices on July 18, 2011. The files were missing required children's programming records for five quarters as well as proof of performance tests for 2008 and 2009.¹²

The ten NOVs listed above are being issued to the various cable and satellite companies for failing to file their children's programming material in a timely manner. We caution these companies that future violations could result in more severe sanctions, including monetary forfeitures.

We also take this opportunity to remind all cable and satellite operators of their ongoing obligations under the CTA and the Commission's rules. The Bureau will continue to monitor compliance with these rules consistent with their importance in safeguarding children.¹³

In particular, we remind cable and satellite operators to maintain records sufficient to verify their compliance with the advertising restrictions and to make such records available to the public.¹⁴ Cable and satellite operators are specifically required to update these records in the system's public file no later than the tenth day of the quarter following the quarter in which the covered programming aired, and they must keep the material in the public file for at least one year.¹⁵

Issued by: Chief, Enforcement Bureau

* * * *

Need More Information? For additional information regarding this Enforcement Advisory, please contact Guy Benson of the Enforcement Bureau at 202-418-2946 or at Guy.Benson@fcc.gov. Media inquiries should be directed to Neil Grace at (202) 418-0506 or Neil.Grace@fcc.gov.

¹¹ 47 C.F.R. §§ 76.1703, 76.1704.

¹² Pursuant to Section 76.601 of the Commission's Rules (47 C.F.R. § 76.601), cable system operators must conduct periodic tests to determine the extent to which their systems comply with technical standards. Section 76.1704 of the Commission's Rules states: "[T]he proof of performance tests required by § 76.601 shall be maintained on file at the operator's local business office for at least five years. The test data shall be made available for inspection by the Commission or the local franchiser, upon request." 47 C.F.R. § 76.1704.

¹³ See, e.g., *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 22943, 22945, para. 5 (2004); *Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065, 11066, para. 5 (2006). The Commission also monitors compliance by television broadcast licensees. See, e.g., *WSOC Television, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 6124 (2010); *WCVB Hearst Television, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 6128 (2010); *Media General Communications Holdings, LLC*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 6132 (2010).

¹⁴ See 47 C.F.R. §§ 76.1703, 25.701(e)(3).

¹⁵ See 1991 MO&O, 6 FCC Rcd at 5097, para. 23; 2004 Second Order, 19 FCC Rcd at 5668, para. 48. The retention period must be sufficient to cover the limitations specified in 47 U.S.C. § 503(b)(6)(B). See also 47 C.F.R. § 1.80(b)(4) (forfeitures).

For additional information concerning the Children's Television Act rules, please contact Kim Matthews at (202) 418-2154 or at Kim.Matthews@fcc.gov.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). You may also contact the Enforcement Bureau on its TTY line at 202-418-1148 for further information about this Enforcement Advisory, or the Media Bureau on its TTY line at (202) 418-0432 or 1 (888) 835-5322 for further information about the Children's Programming rules.

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PUBLIC NOTICE

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DA 12-1144

Released: July 17, 2012

**WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON REQUESTS BY
PROGENY LMS, LLC, FCR, INC., HELEN WONG-ARMIJO, AND PCS PARTNERS, L.P. FOR
WAIVER AND EXTENSION OF TIME TO CONSTRUCT 900 MHZ MULTILATERATION
LOCATION AND MONITORING SERVICE LICENSES**

WT Docket 12-202

Comment Date: August 16, 2012

Reply Comment Date: August 31, 2012

By this *Public Notice*, the Wireless Telecommunications Bureau (Bureau) seeks comment on the requests for a waiver of Section 90.155(d) of the Commission's Rules¹ and extension of time filed by multiple licensees in the Multilateration and Location and Monitoring Service (M-LMS) to meet their construction deadlines for their 900 MHz M-LMS Economic Area (EA) licenses.² Section 90.155(d) of the Commission's Rules requires M-LMS EA licensees either: (1) to construct and place in operation a sufficient number of base stations that utilize multilateration location service to one-third of the EA's population within five years of the initial license grant, and two-thirds of the population within ten years or, (2) in the alternative, to provide substantial service to their licensed area within the appropriate five and ten year benchmarks.³ In an Order issued in November 2008, the Bureau extended these construction requirements for Progeny, FCR, Wong-Armijo, PCS Partners, and two other M-LMS licensees, requiring these licensees to meet the five-year construction requirement on or before July 19, 2012, and the ten-year requirement on or before July 19, 2014.⁴

Progeny Waiver Request. Progeny seeks the following extensions of the applicable construction requirements: (1) a ninety day extension of the first construction deadline (until October 19, 2012) for 80 M-LMS licenses covering 40 specified EA's;⁵ (2) a two year extension of both the first and

¹ 47 C.F.R. § 90.155(d).

² See Progeny LMS, LLC (Progeny) Request for Waiver and Extension of Time (filed June 21, 2012) (Progeny Waiver Request); FCR, Inc. (FCR) Request for Waiver and Extension of Build-out Deadlines (filed July 11, 2012) (FCR Waiver Request); Helen Wong-Armijo (Wong-Armijo) Request for Waiver and Extension of Build-out Deadlines (filed July 11, 2012) (Wong-Armijo Waiver Request); PCS Partners, L.P. (PCS Partners) Request for Extension of Time (filed July 13, 2012) (PCS Partners Waiver Request). The Attachments to this *Public Notice* list the related Universal Licensing System (ULS) file numbers. The call signs and EA's for which Progeny, FCR, Wong-Armijo, and PCS Partners request a waiver are also listed in the Attachments to the *Public Notice*.

³ See 47 C.F.R. § 90.155(d).

⁴ See Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules, WT Docket No. 08-60, *Order*, 23 FCC Rcd 17250 (WTB, 2008) (LMS Extension Order).

⁵ See Progeny Waiver Request at 2 & Attachment B.

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second construction deadlines (until July 19, 2014, and July 19, 2016, respectively) of 40 licenses covering 20 EA's;⁶ (3) a three year extension of the first and second construction deadlines (until July 19, 2015, and July 19, 2017, respectively) for 60 licenses covering 30 EA's;⁷ and (4) a four year extension of these deadlines (until July 19, 2016, and July 19, 2018, respectively) for 48 licenses covering 25 EA's.⁸

Progeny plans to deploy a position location service under a waiver of two technical rules, which the Bureau granted in December 2011 under the conditions that Progeny file a report demonstrating that its M-LMS system will not cause unacceptable levels of interference to Part 15 devices and the Commission provides notification that Progeny may commence commercial service.⁹ Progeny explains that it seeks a ninety day extension of the first construction deadline for its M-LMS stations in forty of its most populous and urban EA's in order for the Commission to complete its review of Progeny's Part 15 test demonstration and authorize Progeny to provide commercial service.¹⁰ Progeny further explains that it seeks a two, three, or four year extension of the first and second construction deadlines for its M-LMS stations covering suburban and rural EA's to enable Progeny "to undertake a phased and coordinated rollout of its position location service."¹¹ Progeny claims a waiver is warranted due to the regulatory uncertainty and resulting delay surrounding Progeny's M-MLS licenses.¹² Progeny asserts that because of the regulatory uncertainty, "the necessary M-LMS equipment remains unavailable on a mass-production scale despite Progeny's diligent efforts to pursue its development."¹³ As such, Progeny argues that these "impediments are beyond their control and strict application of the construction deadlines would be inequitable and unduly burdensome."¹⁴ Progeny notes that it is diligently proceeding with the construction of its M-LMS network.¹⁵

Progeny contends that a Commission grant "would serve the public interest because its M-LMS network will address public safety needs, including the critical need for improved location accuracy for emergency E911 services, particularly indoors and in dense urban areas."¹⁶ Progeny further asserts that the "unique spectrum sharing requirements of the 901-928 MHz band ensure that the band will continue to be used by other services and will not be left fallow while Progeny completes the construction of its M-LMS network."¹⁷

⁶ See *id.* at 2 & Attachment C.

⁷ See *id.* at 2-3 & Attachment D.

⁸ See *id.* at 2-3 & Attachment E.

⁹ See *Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules*, WT Docket No. 11-49, *Order*, 26 FCC Rcd 16878, ¶ 29 (WTB and OET, rel. Dec. 20, 2011). Under the waiver, Progeny may not commence commercial service until it files a report that provides details of the M-LMS system design, describes the process by which it carried out the field testing, including the particular types of Part 15 devices tested, and demonstrates that its M-LMS system will not cause unacceptable levels of interference to Part 15 devices that operate in the 902-928 MHz band. If the Commission determines that there are no significant interference issues, the Commission will notify Progeny that it may commence commercial service. *Id.* at ¶¶ 29, 35.

¹⁰ Progeny Waiver Request at i, Attachment B.

¹¹ *Id.* at i, 2-3.

¹² *Id.* at i, 3-8.

¹³ *Id.* at i, 1, 3, 8-12.

¹⁴ *Id.* at i, 16-17.

¹⁵ *Id.* at ii, 16.

¹⁶ Progeny Waiver Request at i-ii, 3, 12-15.

¹⁷ *Id.* at ii, 3, 17.

FCR and Wong-Armijo Waiver Requests. FCR seeks a five-year extension of the first construction deadline (until July 19, 2017) for 13 M-LMS licenses covering 13 EA's.¹⁸ Wong-Armijo seeks a five-year extension of the first construction deadline (until July 19, 2017) for 84 M-LMS licenses covering 60 EA's.¹⁹ FCR and Wong-Armijo both claim a waiver is needed as nothing has changed since November of 2008, when the Commission extended the build-out dates for all M-LMS licenses, as there is still no nonproprietary, commercially available equipment, no M-LMS licensee provides a commercial service, the rules remain unchanged, and the LMS rulemaking remains pending.²⁰

PCS Partners Waiver Request. PCS Partners seeks an extension of the first and second construction deadlines until five years after final Commission action on the rule changes proposed in the 904-928 MHz Bands NPRM for 32 M-LMS licenses covering 32 EA's.²¹ PCS Partners states that a waiver is needed because the factors the Bureau relied on in the *LMS Extension Order* remain materially unchanged.²² PCS Partners states that "based on its continuing due diligence, PCS Partners believes there has been no material change in the equipment market since the [*LMS Extension Order*]" and there is no viable equipment that would permit PCS Partners to satisfy its initial construction deadline.²³ PCS Partners further claims that regulatory uncertainty remains, affecting the equipment market, and that resolution of the pending rulemaking proceeding would bring certainty to the future of licensed operations in the 902-928 MHz band.²⁴

Procedural Matters

Comments on the request are due **no later than August 16, 2012**. Reply comments are due **no later than August 31, 2012**. All filings should reference the docket number of this proceeding, **WT 12-202**.

This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation

¹⁸ See FCR Waiver Request at 1.

¹⁹ See Wong-Armijo Waiver Request at 1.

²⁰ See FCR Waiver Request at 2; Wong-Armijo Waiver Request at 2. See LMS Extension Order. See Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands. *Notice of Proposed Rulemaking*, 21 FCC Red. 2809 (2006) (904-928 MHz Bands NPRM).

²¹ See PCS Partners Waiver Request at 1, 6 & Attachment 1-A; 904-928 MHz Bands NPRM. PCS Partners states that due to limitations in the FCC's Universal Licensing System, PCS Partners is unable to specify more than one requested extension date and also is unable to specify a requested date later than expiration of the licenses (July 25, 2013). See *id.* at 6.

²² *Id.* at 1.

²³ *Id.* at 3, 5.

²⁴ *Id.* at 3-6.

²⁵ See 47 C.F.R. §§ 1.1200(a), 1.1206.

consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

-Effective December 28, 2009, all hand-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., S.W., Room TW-A325, Washington, DC20554. All hand deliveries must be held together with rubber bands or fasteners. Envelopes must be disposed of before entering the building. The filing hours at this location are 8:00 a.m. to 7:00 p.m. **PLEASE NOTE:** The Commission's former filing location at 236 Massachusetts Ave., N.E. is permanently closed.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, DC20554.

Parties are requested to send one copy of their comments and reply comments to Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C.20554, (800) 378-3160, e-mail FCC@BCPIWEB.com.

The request, and comments and reply comments filed in response to this *Public Notice* are available for viewing via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, **WT 12-**. The documents also will be available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from Best Copy and Printing, Inc., telephone (800) 378-3160, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail FCC@BCPIWEB.com.

Alternate formats of this *Public Notice* (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY), or send an e-mail to fcc504@fcc.gov.

For further information, contact Ms. Becky Schwartz of the Mobility Division, Wireless Telecommunications Bureau at (202) 418-7178, or via e-mail at Becky.Schwartz@fcc.gov.

Action by the Chief, Mobility Division, Wireless Telecommunications Bureau.

- FCC -

ATTACHMENT A

FILE NUMBERS, CALLSIGNS, MARKET CODES, MARKET DESCRIPTIONS, AND CHANNEL BLOCKS FOR WHICH WAIVER OF 90.155(D) IS REQUESTED BY PROGENY

File Number	Call Sign	Market Code	Market Description	Channel Block
0005273211	WPQP849	BEA003	Boston-Worcester-Lawrence-Lowe	B
0005273212	WPQP850	BEA003	Boston-Worcester-Lawrence-Lowe	C
0005273213	WPQP855	BEA006	Syracuse, NY-PA	B
0005273214	WPQP856	BEA006	Syracuse, NY-PA	C
0005273215	WPQP863	BEA010	New York-No. New Jer.-Long Isl	B
0005273216	WPQP864	BEA010	New York-No. New Jer.-Long Isl	C
0005273217	WPQP867	BEA012	Philadelphia-Wilmington-Atl. C	B
0005273218	WPQP868	BEA012	Philadelphia-Wilmington-Atl. C	C
0005273219	WPQP869	BEA013	Washington-Baltimore, DC-MD-VA	B
0005273220	WPQP870	BEA013	Washington-Baltimore, DC-MD-VA	C
0005273221	WPQP875	BEA018	Greensboro-Winston-Salem-High	B
0005273222	WPQP876	BEA018	Greensboro-Winston-Salem-High	C
0005273223	WPQP877	BEA019	Raleigh-Durham-Chapel Hill, NC	B
0005273224	WPQP878	BEA019	Raleigh-Durham-Chapel Hill, NC	C
0005273225	WPQP883	BEA023	Charlotte-Gastonia-Rock Hill,	B
0005273226	WPQP884	BEA023	Charlotte-Gastonia-Rock Hill,	C
0005273227	WPQP895	BEA029	Jacksonville, FL-GA	B
0005273228	WPQP896	BEA029	Jacksonville, FL-GA	C
0005273229	WPQP897	BEA030	Orlando, FL	B
0005273230	WPQP898	BEA030	Orlando, FL	C
0005273231	WPQP899	BEA031	Miami-Fort Lauderdale, FL	B
0005273232	WPQP900	BEA031	Miami-Fort Lauderdale, FL	C
0005273233	WPQP905	BEA034	Tampa-St. Petersburg-Clearwater	B
0005273234	WPQP906	BEA034	Tampa-St. Petersburg-Clearwater	C
0005273235	WPQP911	BEA040	Atlanta, GA-AL-NC	B
0005273236	WPQP912	BEA040	Atlanta, GA-AL-NC	C
0005273237	WPQP925	BEA049	Cincinnati-Hamilton, OH-KY-IN	B
0005273238	WPQP926	BEA049	Cincinnati-Hamilton, OH-KY-IN	C
0005273239	WPQP929	BEA051	Columbus, OH	B
0005273240	WPQP930	BEA051	Columbus, OH	C
0005273241	WPQP931	BEA053	Pittsburgh, PA-WV	B
0005273242	WPQP932	BEA053	Pittsburgh, PA-WV	C
0005273243	WPQP935	BEA055	Cleveland-Akron, OH-PA	B
0005273244	WPQP936	BEA055	Cleveland-Akron, OH-PA	C
0005273245	WPQP939	BEA057	Detroit-Ann Arbor-Flint, MI	B
0005273246	WPQP940	BEA057	Detroit-Ann Arbor-Flint, MI	C

0005273247	WPQP943	BEA062	Grand Rapids-Muskegon-Holland,	B
0005273248	WPQP944	BEA062	Grand Rapids-Muskegon-Holland,	C
0005273249	WPQP945	BEA063	Milwaukee-Racine, WI	B
0005273250	WPQP946	BEA063	Milwaukee-Racine, WI	C
0005273251	WPQP947	BEA064	Chicago-Gary-Kenosha, IL-IN-WI	B
0005273252	WPQP948	BEA064	Chicago-Gary-Kenosha, IL-IN-WI	C
0005273253	WPQP953	BEA067	Indianapolis, IN-IL	B
0005273254	WPQP954	BEA067	Indianapolis, IN-IL	C
0005273255	WPQP961	BEA071	Nashville, TN-KY	B
0005273256	WPQP962	BEA071	Nashville, TN-KY	C
0005273257	WPQP963	BEA073	Memphis, TN-AR-MS-KY	B
0005273258	WPQP964	BEA073	Memphis, TN-AR-MS-KY	C
0005273259	WPQP977	BEA083	New Orleans, LA-MS	B
0005273260	WPQP978	BEA083	New Orleans, LA-MS	C
0005273261	WPQP991	BEA096	St. Louis, MO-IL	B
0005273262	WPQP992	BEA096	St. Louis, MO-IL	C
0005273263	WPQP993	BEA099	Kansas City, MO-KS	B
0005273264	WPQP994	BEA099	Kansas City, MO-KS	C
0005273265	WPQQ212	BEA125	Oklahoma City, OK	B
0005273266	WPQQ213	BEA125	Oklahoma City, OK	C
0005273267	WPQQ214	BEA127	Dallas-Fort Worth, TX-AR-OK	B
0005273268	WPQQ215	BEA127	Dallas-Fort Worth, TX-AR-OK	C
0005273269	WPQQ218	BEA131	Houston-Galveston-Brazoria, TX	B
0005273270	WPQQ219	BEA131	Houston-Galveston-Brazoria, TX	C
0005273271	WPQQ224	BEA134	San Antonio, TX	B
0005273272	WPQQ225	BEA134	San Antonio, TX	C
0005273273	WPQQ226	BEA141	Denver-Boulder-Greeley, CO-KS-	B
0005273274	WPQQ227	BEA141	Denver-Boulder-Greeley, CO-KS-	C
0005273275	WPQQ234	BEA152	Salt Lake City-Ogden, UT-ID	B
0005273276	WPQQ235	BEA152	Salt Lake City-Ogden, UT-ID	C
0005273277	WPQQ236	BEA153	Las Vegas, NV-AZ-UT	B
0005273278	WPQQ237	BEA153	Las Vegas, NV-AZ-UT	C
0005273279	WPQQ242	BEA158	Phoenix-Mesa, AZ-NM	B
0005273280	WPQQ243	BEA158	Phoenix-Mesa, AZ-NM	C
0005273281	WPQQ246	BEA160	Los Angeles-Riverside-Orange C	B
0005273282	WPQQ247	BEA160	Los Angeles-Riverside-Orange C	C
0005273283	WPQQ248	BEA161	San Diego, CA	B
0005273284	WPQQ249	BEA161	San Diego, CA	C
0005273285	WPQQ252	BEA163	San Francisco-Oakland-San Jose	B
0005273286	WPQQ253	BEA163	San Francisco-Oakland-San Jose	C
0005273287	WPQQ257	BEA167	Portland-Salem, OR-WA	B

0005273288	WPQQ258	BEA167	Portland-Salem, OR-WA	C
0005273289	WPQQ261	BEA170	Seattle-Tacoma-Bremerton, WA	B
0005273290	WPQQ262	BEA170	Seattle-Tacoma-Bremerton, WA	C
0005273309	WPQP853	BEA005	Albany-Schenectady-Troy, NY	B
0005273310	WPQP854	BEA005	Albany-Schenectady-Troy, NY	C
0005273311	WPQP857	BEA007	Rochester, NY-PA	B
0005273312	WPQP858	BEA007	Rochester, NY-PA	C
0005273313	WPQP859	BEA008	Buffalo-Niagara Falls, NY-PA	B
0005273314	WPQP860	BEA008	Buffalo-Niagara Falls, NY-PA	C
0005273315	WPQP871	BEA015	Richmond-Petersburg, VA	B
0005273316	WPQP872	BEA015	Richmond-Petersburg, VA	C
0005273317	WPQP879	BEA020	Norfolk-Virginia Beach-Newport	B
0005273318	WPQP880	BEA020	Norfolk-Virginia Beach-Newport	C
0005273319	WPQP927	BEA050	Dayton-Springfield, OH	B
0005273320	WPQP928	BEA050	Dayton-Springfield, OH	C
0005273321	WPQP937	BEA056	Toledo, OH	B
0005273322	WPQP938	BEA056	Toledo, OH	C
0005273323	WPQP959	BEA070	Louisville, KY-IN	B
0005273324	WPQP960	BEA070	Louisville, KY-IN	C
0005273325	WPQP971	BEA078	Birmingham, AL	B
0005273326	WPQP972	BEA078	Birmingham, AL	C
0005273327	WPQP979	BEA084	Baton Rouge, LA-MS	B
0005273328	WPQP980	BEA084	Baton Rouge, LA-MS	C
0005273329	WPQP987	BEA090	Little Rock-North Little Rock,	B
0005273330	WPQP988	BEA090	Little Rock-North Little Rock,	C
0005273331	WPQQ206	BEA118	Omaha, NE-IA-MO	B
0005273332	WPQQ207	BEA118	Omaha, NE-IA-MO	C
0005273333	WPQQ210	BEA124	Tulsa, OK-KS	B
0005273334	WPQQ211	BEA124	Tulsa, OK-KS	C
0005273335	WPQQ216	BEA130	Austin-San Marcos, TX	B
0005273336	WPQQ217	BEA130	Austin-San Marcos, TX	C
0005273337	WPQQ232	BEA151	Reno, NV-CA	B
0005273338	WPQQ233	BEA151	Reno, NV-CA	C
0005273339	WPQQ238	BEA156	Albuquerque, NM-AZ	B
0005273340	WPQQ239	BEA156	Albuquerque, NM-AZ	C
0005273341	WPQQ240	BEA157	El Paso, TX-NM	B
0005273342	WPQQ241	BEA157	El Paso, TX-NM	C
0005273343	WPQQ244	BEA159	Tucson, AZ	B
0005273344	WPQQ245	BEA159	Tucson, AZ	C
0005273345	WPQQ250	BEA162	Fresno, CA	B
0005273346	WPQQ251	BEA162	Fresno, CA	C

0005273347	WPQQ265	BEA172	Honolulu, HI	B
0005273348	WPQQ266	BEA172	Honolulu, HI	C
0005273354	WPQP853	BEA005	Albany-Schenectady-Troy, NY	B
0005273355	WPQP854	BEA005	Albany-Schenectady-Troy, NY	C
0005273356	WPQP857	BEA007	Rochester, NY-PA	B
0005273357	WPQP858	BEA007	Rochester, NY-PA	C
0005273358	WPQP859	BEA008	Buffalo-Niagara Falls, NY-PA	B
0005273359	WPQP860	BEA008	Buffalo-Niagara Falls, NY-PA	C
0005273360	WPQP871	BEA015	Richmond-Petersburg, VA	B
0005273361	WPQP872	BEA015	Richmond-Petersburg, VA	C
0005273362	WPQP879	BEA020	Norfolk-Virginia Beach-Newport	B
0005273363	WPQP880	BEA020	Norfolk-Virginia Beach-Newport	C
0005273364	WPQP927	BEA050	Dayton-Springfield, OH	B
0005273365	WPQP928	BEA050	Dayton-Springfield, OH	C
0005273366	WPQP937	BEA056	Toledo, OH	B
0005273367	WPQP938	BEA056	Toledo, OH	C
0005273368	WPQP959	BEA070	Louisville, KY-IN	B
0005273369	WPQP960	BEA070	Louisville, KY-IN	C
0005273370	WPQP971	BEA078	Birmingham, AL	B
0005273371	WPQP972	BEA078	Birmingham, AL	C
0005273372	WPQP979	BEA084	Baton Rouge, LA-MS	B
0005273373	WPQP980	BEA084	Baton Rouge, LA-MS	C
0005273374	WPQP987	BEA090	Little Rock-North Little Rock,	B
0005273375	WPQP988	BEA090	Little Rock-North Little Rock,	C
0005273376	WPQQ206	BEA118	Omaha, NE-IA-MO	B
0005273377	WPQQ207	BEA118	Omaha, NE-IA-MO	C
0005273378	WPQQ210	BEA124	Tulsa, OK-KS	B
0005273379	WPQQ211	BEA124	Tulsa, OK-KS	C
0005273380	WPQQ216	BEA130	Austin-San Marcos, TX	B
0005273381	WPQQ217	BEA130	Austin-San Marcos, TX	C
0005273382	WPQQ232	BEA151	Reno, NV-CA	B
0005273383	WPQQ233	BEA151	Reno, NV-CA	C
0005273384	WPQQ238	BEA156	Albuquerque, NM-AZ	B
0005273385	WPQQ239	BEA156	Albuquerque, NM-AZ	C
0005273386	WPQQ240	BEA157	El Paso, TX-NM	B
0005273387	WPQQ241	BEA157	El Paso, TX-NM	C
0005273388	WPQQ244	BEA159	Tucson, AZ	B
0005273389	WPQQ245	BEA159	Tucson, AZ	C
0005273390	WPQQ250	BEA162	Fresno, CA	B
0005273391	WPQQ251	BEA162	Fresno, CA	C
0005273392	WPQQ265	BEA172	Honolulu, HI	B

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0005273393	WPQQ266	BEA172	Honolulu, HI	C
0005273400	WPQP865	BEA011	Harrisburg-Lebanon-Carlisle, P	B
0005273401	WPQP866	BEA011	Harrisburg-Lebanon-Carlisle, P	C
0005273402	WPQP885	BEA024	Columbia, SC	B
0005273403	WPQP886	BEA024	Columbia, SC	C
0005273404	WPQP889	BEA026	Charleston-North Charleston, S	B
0005273405	WPQP890	BEA026	Charleston-North Charleston, S	C
0005273406	WPQP891	BEA027	Augusta-Aiken, GA-SC	B
0005273407	WPQP892	BEA027	Augusta-Aiken, GA-SC	C
0005273408	WPQP901	BEA032	Fort Myers-Cape Coral, FL	B
0005273409	WPQP902	BEA032	Fort Myers-Cape Coral, FL	C
0005273410	WPQP903	BEA033	Sarasota-Bradenton, FL	B
0005273411	WPQP904	BEA033	Sarasota-Bradenton, FL	C
0005273412	WPQP907	BEA035	Tallahassee, FL-GA	B
0005273413	WPQP908	BEA035	Tallahassee, FL-GA	C
0005273414	WPQP909	BEA038	Macon, GA	B
0005273415	WPQP910	BEA038	Macon, GA	C
0005273416	WPQP913	BEA041	Greenville-Spartanburg-Anderso	B
0005273417	WPQP914	BEA041	Greenville-Spartanburg-Anderso	C
0005273418	WPQP917	BEA044	Knoxville, TN	B
0005273419	WPQP918	BEA044	Knoxville, TN	C
0005273420	WPQP919	BEA045	Johnson City-Kingsport-Bristol	B
0005273421	WPQP920	BEA045	Johnson City-Kingsport-Bristol	C
0005273422	WPQP923	BEA048	Charleston, WV-KY-OH	B
0005273423	WPQP924	BEA048	Charleston, WV-KY-OH	C
0005273424	WPQP933	BEA054	Erie, PA	B
0005273425	WPQP934	BEA054	Erie, PA	C
0005273426	WPQP941	BEA059	Green Bay, WI-MI	B
0005273427	WPQP942	BEA059	Green Bay, WI-MI	C
0005273428	WPQP949	BEA065	Elkhart-Goshen, IN-MI	B
0005273429	WPQP950	BEA065	Elkhart-Goshen, IN-MI	C
0005273430	WPQP951	BEA066	Fort Wayne, IN	B
0005273431	WPQP952	BEA066	Fort Wayne, IN	C
0005273432	WPQP965	BEA074	Huntsville, AL-TN	B
0005273433	WPQP966	BEA074	Huntsville, AL-TN	C
0005273434	WPQP973	BEA080	Mobile, AL	B
0005273435	WPQP974	BEA080	Mobile, AL	C
0005273436	WPQP985	BEA088	Shreveport-Bossier City, LA-AR	B
0005273437	WPQP986	BEA088	Shreveport-Bossier City, LA-AR	C
0005273438	WPQP989	BEA094	Springfield, MO	B
0005273439	WPQP990	BEA094	Springfield, MO	C

0005273440	WPQP995	BEA100	Des Moines, IA-IL-MO	B
0005273441	WPQP996	BEA100	Des Moines, IA-IL-MO	C
0005273442	WPQP997	BEA101	Peoria-Pekin, IL	B
0005273443	WPQP998	BEA101	Peoria-Pekin, IL	C
0005273444	WPQP999	BEA102	Davenport-Moline-Rock Island,	B
0005273445	WPQQ200	BEA102	Davenport-Moline-Rock Island,	C
0005273446	WPQQ201	BEA104	Madison, WI-IA-IL	B
0005273447	WPQQ202	BEA104	Madison, WI-IA-IL	C
0005273448	WPQQ208	BEA122	Wichita, KS-OK	B
0005273449	WPQQ209	BEA122	Wichita, KS-OK	C
0005273450	WPQQ220	BEA132	Corpus Christi, TX	B
0005273451	WPQQ221	BEA132	Corpus Christi, TX	C
0005273452	WPQQ222	BEA133	McAllen-Edinburg-Mission, TX	B
0005273453	WPQQ223	BEA133	McAllen-Edinburg-Mission, TX	C
0005273454	WPQQ228	BEA147	Spokane, WA-ID	B
0005273455	WPQQ229	BEA147	Spokane, WA-ID	C
0005273456	WPQQ230	BEA150	Boise City, ID-OR	B
0005273457	WPQQ231	BEA150	Boise City, ID-OR	C
0005273458	WPQQ263	BEA171	Anchorage, AK	B
0005273459	WPQQ264	BEA171	Anchorage, AK	C
0005273491	WPQP865	BEA011	Harrisburg-Lebanon-Carlisle, P	B
0005273492	WPQP866	BEA011	Harrisburg-Lebanon-Carlisle, P	C
0005273493	WPQP885	BEA024	Columbia, SC	B
0005273494	WPQP886	BEA024	Columbia, SC	C
0005273495	WPQP889	BEA026	Charleston-North Charleston, S	B
0005273496	WPQP890	BEA026	Charleston-North Charleston, S	C
0005273497	WPQP891	BEA027	Augusta-Aiken, GA-SC	B
0005273498	WPQP892	BEA027	Augusta-Aiken, GA-SC	C
0005273499	WPQP901	BEA032	Fort Myers-Cape Coral, FL	B
0005273500	WPQP902	BEA032	Fort Myers-Cape Coral, FL	C
0005273501	WPQP903	BEA033	Sarasota-Bradenton, FL	B
0005273502	WPQP904	BEA033	Sarasota-Bradenton, FL	C
0005273503	WPQP907	BEA035	Tallahassee, FL-GA	B
0005273504	WPQP908	BEA035	Tallahassee, FL-GA	C
0005273505	WPQP909	BEA038	Macon, GA	B
0005273506	WPQP910	BEA038	Macon, GA	C
0005273507	WPQP913	BEA041	Greenville-Spartanburg-Anderso	B
0005273508	WPQP914	BEA041	Greenville-Spartanburg-Anderso	C
0005273509	WPQP917	BEA044	Knoxville, TN	B
0005273510	WPQP918	BEA044	Knoxville, TN	C
0005273511	WPQP919	BEA045	Johnson City-Kingsport-Bristol	B

0005273512	WPQP920	BEA045	Johnson City-Kingsport-Bristol	C
0005273513	WPQP923	BEA048	Charleston, WV-KY-OH	B
0005273514	WPQP924	BEA048	Charleston, WV-KY-OH	C
0005273515	WPQP933	BEA054	Erie, PA	B
0005273516	WPQP934	BEA054	Erie, PA	C
0005273517	WPQP941	BEA059	Green Bay, WI-MI	B
0005273518	WPQP942	BEA059	Green Bay, WI-MI	C
0005273519	WPQP949	BEA065	Elkhart-Goshen, IN-MI	B
0005273520	WPQP950	BEA065	Elkhart-Goshen, IN-MI	C
0005273521	WPQP951	BEA066	Fort Wayne, IN	B
0005273522	WPQP952	BEA066	Fort Wayne, IN	C
0005273523	WPQP965	BEA074	Huntsville, AL-TN	B
0005273524	WPQP966	BEA074	Huntsville, AL-TN	C
0005273525	WPQP973	BEA080	Mobile, AL	B
0005273526	WPQP974	BEA080	Mobile, AL	C
0005273527	WPQP985	BEA088	Shreveport-Bossier City, LA-AR	B
0005273528	WPQP986	BEA088	Shreveport-Bossier City, LA-AR	C
0005273529	WPQP989	BEA094	Springfield, MO	B
0005273530	WPQP990	BEA094	Springfield, MO	C
0005273531	WPQP995	BEA100	Des Moines, IA-IL-MO	B
0005273532	WPQP996	BEA100	Des Moines, IA-IL-MO	C
0005273533	WPQP997	BEA101	Peoria-Pekin, IL	B
0005273534	WPQP998	BEA101	Peoria-Pekin, IL	C
0005273535	WPQP999	BEA102	Davenport-Moline-Rock Island,	B
0005273536	WPQQ200	BEA102	Davenport-Moline-Rock Island,	C
0005273537	WPQQ201	BEA104	Madison, WI-IA-IL	B
0005273538	WPQQ202	BEA104	Madison, WI-IA-IL	C
0005273539	WPQQ208	BEA122	Wichita, KS-OK	B
0005273540	WPQQ209	BEA122	Wichita, KS-OK	C
0005273541	WPQQ220	BEA132	Corpus Christi, TX	B
0005273542	WPQQ221	BEA132	Corpus Christi, TX	C
0005273543	WPQQ222	BEA133	McAllen-Edinburg-Mission, TX	B
0005273544	WPQQ223	BEA133	McAllen-Edinburg-Mission, TX	C
0005273545	WPQQ228	BEA147	Spokane, WA-ID	B
0005273546	WPQQ229	BEA147	Spokane, WA-ID	C
0005273547	WPQQ230	BEA150	Boise City, ID-OR	B
0005273548	WPQQ231	BEA150	Boise City, ID-OR	C
0005273549	WPQQ263	BEA171	Anchorage, AK	B
0005273550	WPQQ264	BEA171	Anchorage, AK	C
0005273555	WPQP845	BEA001	Bangor, ME	B
0005273556	WPQP846	BEA001	Bangor, ME	C

0005273557	WPQP847	BEA002	Portland, ME	B
0005273558	WPQP848	BEA002	Portland, ME	C
0005273559	WPQP851	BEA004	Burlington, VT-NY	B
0005273560	WPQP852	BEA004	Burlington, VT-NY	C
0005273561	WPQP861	BEA009	State College, PA	B
0005273562	WPQP862	BEA009	State College, PA	C
0005273563	WPQP873	BEA017	Roanoke, VA-NC-WV	B
0005273564	WPQP874	BEA017	Roanoke, VA-NC-WV	C
0005273565	WPQP881	BEA021	Greenville, NC	B
0005273566	WPQP882	BEA021	Greenville, NC	C
0005273567	WPQP887	BEA025	Wilmington, NC-SC	B
0005273568	WPQP888	BEA025	Wilmington, NC-SC	C
0005273569	WPQP893	BEA028	Savannah, GA-SC	B
0005273570	WPQP894	BEA028	Savannah, GA-SC	C
0005273571	WPQP915	BEA043	Chattanooga, TN-GA	B
0005273572	WPQP916	BEA043	Chattanooga, TN-GA	C
0005273573	WPQP921	BEA047	Lexington, KY-TN-VA-WV	B
0005273574	WPQP922	BEA047	Lexington, KY-TN-VA-WV	C
0005273575	WPQP955	BEA068	Champaign-Urbana, IL	B
0005273576	WPQP956	BEA068	Champaign-Urbana, IL	C
0005273577	WPQP957	BEA069	Evansville-Henderson, IN-KY-IL	B
0005273578	WPQP958	BEA069	Evansville-Henderson, IN-KY-IL	C
0005273579	WPQP967	BEA075	Tupelo, MS-AL-TN	B
0005273580	WPQP968	BEA075	Tupelo, MS-AL-TN	C
0005273581	WPQP969	BEA077	Jackson, MS-AL-LA	B
0005273582	WPQP970	BEA077	Jackson, MS-AL-LA	C
0005273583	WPQP975	BEA081	Pensacola, FL	B
0005273584	WPQP976	BEA081	Pensacola, FL	C
0005273585	WPQP981	BEA085	Lafayette, LA	B
0005273586	WPQP982	BEA085	Lafayette, LA	C
0005273587	WPQP983	BEA086	Lake Charles, LA	B
0005273588	WPQP984	BEA086	Lake Charles, LA	C
0005273589	WPQQ203	BEA107	Minneapolis-St. Paul, MN-WI-IA	A
0005273590	WPQQ204	BEA116	Sioux Falls, SD-IA-MN-NE	B
0005273591	WPQQ205	BEA116	Sioux Falls, SD-IA-MN-NE	C
0005273592	WPQQ254	BEA164	Sacramento-Yolo, CA	A
0005273593	WPQQ255	BEA166	Eugene-Springfield, OR-CA	B
0005273594	WPQQ256	BEA166	Eugene-Springfield, OR-CA	C
0005273595	WPQQ259	BEA169	Richland-Kennewick-Pasco, WA	B
0005273596	WPQQ260	BEA169	Richland-Kennewick-Pasco, WA	C
0005273597	WPQQ267	BEA173	Guam & Northern Mariana Isl.	B

0005273598	WPQQ268	BEA173	Guam & Northern Mariana Isl.	C
0005273599	WPQQ269	BEA174	Puerto Rico & Virgin Isl.	B
0005273600	WPQQ270	BEA174	Puerto Rico & Virgin Isl.	C
0005273601	WPQQ271	BEA176	Gulf of Mexico	B
0005273602	WPQQ272	BEA176	Gulf of Mexico	C
0005273607	WPQP845	BEA001	Bangor, ME	B
0005273608	WPQP846	BEA001	Bangor, ME	C
0005273609	WPQP847	BEA002	Portland, ME	B
0005273610	WPQP848	BEA002	Portland, ME	C
0005273611	WPQP851	BEA004	Burlington, VT-NY	B
0005273612	WPQP852	BEA004	Burlington, VT-NY	C
0005273613	WPQP861	BEA009	State College, PA	B
0005273614	WPQP862	BEA009	State College, PA	C
0005273615	WPQP873	BEA017	Roanoke, VA-NC-WV	B
0005273616	WPQP874	BEA017	Roanoke, VA-NC-WV	C
0005273617	WPQP881	BEA021	Greenville, NC	B
0005273618	WPQP882	BEA021	Greenville, NC	C
0005273619	WPQP887	BEA025	Wilmington, NC-SC	B
0005273620	WPQP888	BEA025	Wilmington, NC-SC	C
0005273621	WPQP893	BEA028	Savannah, GA-SC	B
0005273622	WPQP894	BEA028	Savannah, GA-SC	C
0005273623	WPQP915	BEA043	Chattanooga, TN-GA	B
0005273624	WPQP916	BEA043	Chattanooga, TN-GA	C
0005273625	WPQP921	BEA047	Lexington, KY-TN-VA-WV	B
0005273626	WPQP922	BEA047	Lexington, KY-TN-VA-WV	C
0005273627	WPQP955	BEA068	Champaign-Urbana, IL	B
0005273628	WPQP956	BEA068	Champaign-Urbana, IL	C
0005273629	WPQP957	BEA069	Evansville-Henderson, IN-KY-IL	B
0005273630	WPQP958	BEA069	Evansville-Henderson, IN-KY-IL	C
0005273631	WPQP967	BEA075	Tupelo, MS-AL-TN	B
0005273632	WPQP968	BEA075	Tupelo, MS-AL-TN	C
0005273633	WPQP969	BEA077	Jackson, MS-AL-LA	B
0005273634	WPQP970	BEA077	Jackson, MS-AL-LA	C
0005273635	WPQP975	BEA081	Pensacola, FL	B
0005273636	WPQP976	BEA081	Pensacola, FL	C
0005273637	WPQP981	BEA085	Lafayette, LA	B
0005273638	WPQP982	BEA085	Lafayette, LA	C
0005273639	WPQP983	BEA086	Lake Charles, LA	B
0005273640	WPQP984	BEA086	Lake Charles, LA	C
0005273641	WPQQ203	BEA107	Minneapolis-St. Paul, MN-WI-IA	A
0005273642	WPQQ204	BEA116	Sioux Falls, SD-IA-MN-NE	B

0005273643	WPQQ205	BEA116	Sioux Falls, SD-IA-MN-NE	C
0005273644	WPQQ254	BEA164	Sacramento-Yolo, CA	A
0005273645	WPQQ255	BEA166	Eugene-Springfield, OR-CA	B
0005273646	WPQQ256	BEA166	Eugene-Springfield, OR-CA	C
0005273647	WPQQ259	BEA169	Richland-Kennewick-Pasco, WA	B
0005273648	WPQQ260	BEA169	Richland-Kennewick-Pasco, WA	C
0005273649	WPQQ267	BEA173	Guam & Northern Mariana Isl.	B
0005273650	WPQQ268	BEA173	Guam & Northern Mariana Isl.	C
0005273651	WPQQ269	BEA174	Puerto Rico & Virgin Isl.	B
0005273652	WPQQ270	BEA174	Puerto Rico & Virgin Isl.	C
0005273653	WPQQ271	BEA176	Gulf of Mexico	B
0005273654	WPQQ272	BEA176	Gulf of Mexico	C

ATTACHMENT B

**FILE NUMBERS, CALLSIGNS, MARKET CODES, MARKET DESCRIPTIONS, AND
CHANNEL BLOCKS FOR WHICH WAIVER OF 90.155(D) IS REQUESTED BY FCR**

File Number	Call Sign	Market Code	Market Description	Channel Block
0005288395	WPOJ871	BEA008	Buffalo-Niagara Falls, NY-PA	A
0005288396	WPOJ872	BEA034	Tampa-St. Petersburg-Clearwater	A
0005288397	WPOJ873	BEA040	Atlanta, GA-AL-NC	A
0005288398	WPOJ874	BEA055	Cleveland-Akron, OH-PA	A
0005288399	WPOJ875	BEA153	Las Vegas, NV-AZ-UT	A
0005288400	WPTH901	BEA001	Bangor, ME	A
0005288401	WPTH902	BEA002	Portland, ME	A
0005288402	WPTH903	BEA045	Johnson City-Kingsport-Bristol	A
0005288403	WPTH904	BEA048	Charleston, WV-KY-OH	A
0005288404	WPTH905	BEA052	Wheeling, WV-OH	A
0005288405	WPTH906	BEA054	Erie, PA	A
0005288406	WPTH907	BEA061	Traverse City, MI	A
0005288407	WPTH908	BEA062	Grand Rapids-Muskegon-Holland,	A

ATTACHMENT C

FILE NUMBERS, CALLSIGNS, MARKET CODES, MARKET DESCRIPTIONS, AND CHANNEL BLOCKS FOR WHICH WAIVER OF 90.155(D) IS REQUESTED BY WONG- ARMIJO

File Number	Call Sign	Market Code	Market Description	Channel Block
0005288450	WPTH955	BEA014	Salisbury, MD-DE-VA	C
0005288451	WPTH956	BEA016	Staunton, VA-WV	C
0005288452	WPTH957	BEA022	Fayetteville, NC	B
0005288453	WPTH958	BEA022	Fayetteville, NC	C
0005288454	WPTH959	BEA036	Dothan, AL-FL-GA	B
0005288455	WPTH960	BEA036	Dothan, AL-FL-GA	C
0005288456	WPTH961	BEA037	Albany, GA	B
0005288457	WPTH962	BEA037	Albany, GA	C
0005288458	WPTH963	BEA039	Columbus, GA-AL	B
0005288459	WPTH964	BEA039	Columbus, GA-AL	C
0005288460	WPTH965	BEA042	Asheville, NC	B
0005288461	WPTH966	BEA042	Asheville, NC	C
0005288462	WPTH967	BEA046	Hickory-Morganton, NC-TN	B
0005288463	WPTH968	BEA046	Hickory-Morganton, NC-TN	C
0005288464	WPTH969	BEA052	Wheeling, WV-OH	B
0005288465	WPTH970	BEA052	Wheeling, WV-OH	C
0005288466	WPTH971	BEA058	Northern Michigan, MI	C
0005288467	WPTH972	BEA060	Appleton-Oshkosh-Neenah, WI	B
0005288468	WPTH973	BEA060	Appleton-Oshkosh-Neenah, WI	C
0005288469	WPTH974	BEA061	Traverse City, MI	C
0005288470	WPTH975	BEA072	Paducah, KY-IL	C
0005288471	WPTH976	BEA076	Greenville, MS	C
0005288472	WPTH977	BEA079	Montgomery, AL	B
0005288473	WPTH978	BEA079	Montgomery, AL	C
0005288474	WPTH979	BEA082	Biloxi-Gulfport-Pascagoula, MS	B
0005288475	WPTH980	BEA082	Biloxi-Gulfport-Pascagoula, MS	C
0005288476	WPTH981	BEA087	Beaumont-Port Arthur, TX	B
0005288477	WPTH982	BEA087	Beaumont-Port Arthur, TX	C
0005288478	WPTH983	BEA089	Monroe, LA	B
0005288479	WPTH984	BEA089	Monroe, LA	C
0005288480	WPTH985	BEA091	Fort Smith, AR-OK	C
0005288481	WPTH986	BEA092	Fayetteville-Springdale-Rogers	C
0005288482	WPTH987	BEA093	Joplin, MO-KS-OK	C
0005288483	WPTH988	BEA095	Jonesboro, AR-MO	C
0005288484	WPTH989	BEA097	Springfield, IL-MO	B
0005288485	WPTH990	BEA097	Springfield, IL-MO	C
0005288486	WPTH991	BEA098	Columbia, MO	C
0005288487	WPTH992	BEA103	Cedar Rapids, IA	C
0005288488	WPTH993	BEA105	La Crosse, WI-MN	C

0005288489	WPTH994	BEA106	Rochester, MN-IA-WI	C
0005288490	WPTH995	BEA108	Wausau, WI	B
0005288491	WPTH996	BEA108	Wausau, WI	C
0005288492	WPTH997	BEA109	Duluth-Superior, MN-WI	B
0005288493	WPTH998	BEA109	Duluth-Superior, MN-WI	C
0005288494	WPTH999	BEA110	Grand Forks, ND-MN	C
0005288495	WPTI200	BEA111	Minot, ND	C
0005288496	WPTI201	BEA112	Bismarck, ND-MT-SD	C
0005288497	WPTI202	BEA113	Fargo-Moorhead, ND-MN	C
0005288498	WPTI203	BEA114	Aberdeen, SD	C
0005288499	WPTI204	BEA115	Rapid City, SD-MT-ND-NE	C
0005288500	WPTI205	BEA117	Sioux City, IA-NE-SD	C
0005288501	WPTI206	BEA119	Lincoln, NE	B
0005288502	WPTI207	BEA119	Lincoln, NE	C
0005288503	WPTI208	BEA120	Grand Island, NE	C
0005288504	WPTI209	BEA121	North Platte, NE-CO	C
0005288505	WPTI210	BEA123	Topeka, KS	B
0005288506	WPTI211	BEA123	Topeka, KS	C
0005288507	WPTI212	BEA126	Western Oklahoma, OK	C
0005288508	WPTI213	BEA128	Abilene, TX	C
0005288509	WPTI214	BEA129	San Angelo, TX	C
0005288510	WPTI215	BEA135	Odessa-Midland, TX	B
0005288511	WPTI216	BEA135	Odessa-Midland, TX	C
0005288512	WPTI217	BEA136	Hobbs, NM-TX	C
0005288513	WPTI218	BEA137	Lubbock, TX	B
0005288514	WPTI219	BEA137	Lubbock, TX	C
0005288515	WPTI220	BEA138	Amarillo, TX-NM	B
0005288516	WPTI221	BEA138	Amarillo, TX-NM	C
0005288517	WPTI222	BEA139	Santa Fe, NM	C
0005288518	WPTI223	BEA140	Pueblo, CO-NM	C
0005288519	WPTI224	BEA142	Scottsbluff, NE-WY	C
0005288520	WPTI225	BEA143	Casper, WY-ID-UT	B
0005288521	WPTI226	BEA143	Casper, WY-ID-UT	C
0005288522	WPTI227	BEA144	Billings, MT-WY	B
0005288523	WPTI228	BEA144	Billings, MT-WY	C
0005288524	WPTI229	BEA145	Great Falls, MT	C
0005288525	WPTI230	BEA146	Missoula, MT	C
0005288526	WPTI231	BEA148	Idaho Falls, ID-WY	C
0005288527	WPTI232	BEA149	Twin Falls, ID	C
0005288528	WPTI233	BEA154	Flagstaff, AZ-UT	B
0005288529	WPTI234	BEA154	Flagstaff, AZ-UT	C
0005288530	WPTI235	BEA155	Farmington, NM-CO	C
0005288531	WPTI236	BEA165	Redding, CA-OR	B
0005288532	WPTI237	BEA165	Redding, CA-OR	C
0005288533	WPTI238	BEA168	Pendleton, OR-WA	C

ATTACHMENT D

**FILE NUMBERS, CALLSIGNS, MARKET CODES, MARKET DESCRIPTIONS, AND
CHANNEL BLOCKS FOR WHICH WAIVER OF 90.155(D) IS REQUESTED BY
PCS PARTNERS**

File Number	Call Sign	Market Code	Market Description	Channel Block
0005299291	WPYE267	BEA005	Albany-Schenectady-Troy, NY	A
0005299292	WPYE268	BEA006	Syracuse, NY-PA	A
0005299293	WPYE269	BEA007	Rochester, NY-PA	A
0005299294	WPYE270	BEA020	Norfolk-Virginia Beach-Newport	A
0005299295	WPYE271	BEA022	Fayetteville, NC	A
0005299296	WPYE272	BEA025	Wilmington, NC-SC	A
0005299297	WPYE273	BEA026	Charleston-North Charleston, S	A
0005299298	WPYE274	BEA042	Asheville, NC	A
0005299299	WPYE275	BEA046	Hickory-Morganton, NC-TN	A
0005299300	WPYE276	BEA049	Cincinnati-Hamilton, OH-KY-IN	A
0005299301	WPYE277	BEA050	Dayton-Springfield, OH	A
0005299302	WPYE278	BEA051	Columbus, OH	A
0005299303	WPYE279	BEA059	Green Bay, WI-MI	A
0005299304	WPYE280	BEA060	Appleton-Oshkosh-Neenah, WI	A
0005299305	WPYE281	BEA067	Indianapolis, IN-IL	A
0005299306	WPYE282	BEA070	Louisville, KY-IN	A
0005299307	WPYE283	BEA074	Huntsville, AL-TN	A
0005299308	WPYE284	BEA087	Beaumont-Port Arthur, TX	A
0005299309	WPYE285	BEA096	St. Louis, MO-IL	A
0005299310	WPYE286	BEA097	Springfield, IL-MO	A
0005299311	WPYE287	BEA099	Kansas City, MO-KS	A
0005299312	WPYE288	BEA104	Madison, WI-IA-IL	A
0005299313	WPYE289	BEA105	La Crosse, WI-MN	A
0005299314	WPYE290	BEA106	Rochester, MN-IA-WI	A
0005299315	WPYE291	BEA107	Minneapolis-St. Paul, MN-WI-IA	C
0005299316	WPYE292	BEA108	Wausau, WI	A
0005299317	WPYE293	BEA109	Duluth-Superior, MN-WI	A
0005299318	WPYE294	BEA125	Oklahoma City, OK	A
0005299319	WPYE295	BEA132	Corpus Christi, TX	A
0005299320	WPYE296	BEA133	McAllen-Edinburg-Mission, TX	A
0005299321	WPYE297	BEA135	Odessa-Midland, TX	A
0005299322	WPYE298	BEA157	El Paso, TX-NM	A



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1145
Released: July 17, 2012

**DOMESTIC SECTION 214 APPLICATION FILED FOR THE ACQUISITION OF CERTAIN
ASSETS OF COMMUNICATION SOLUTIONS PARTNERS, INC. BY MCGRAW
COMMUNICATIONS, INC.**

STREAMLINED PLEADING CYCLE ESTABLISHED

WC Docket No. 12-186

Comments Due: July 31, 2012

Reply Comments Due: August 7, 2012

On June 22, 2012, Communication Solutions Partners, Inc. (CSP) and McGraw Communications, Inc. (McGraw) (collectively, Applicants) filed an application pursuant to section 63.03 of the Commission's rules¹ requesting approval for the transfer of certain assets of CSP to McGraw.²

CSP, a Massachusetts corporation, was authorized to provide local interexchange and interstate telecommunications services on a competitive basis in Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, Maine, and New York. CSP provided telecommunications services included local, long distance, calling card, conferencing services in these states. John Whalley, a U.S. citizen, is the sole owner of CSP and its affiliate, Whalley Computer Associates, Inc. (WCA).

McGraw, a New York corporation, provides local and long distance data and voice services as well as Internet and high-speed circuits nationwide and holds certificates of public convenience and necessity to provide service in the District of Columbia and the following states: Arizona, California, Colorado, Connecticut, Florida, Georgia, Iowa, Illinois, Indiana, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin.

¹ 47 C.F.R. § 63.03; see 47 U.S.C. § 214. Applicants filed a supplement to their transfer of control application on July 16, 2012.

² McGraw is currently providing service to certain former customers of CSP under Special Temporary Authority granted by the Bureau on June 26, 2012. *Communication Solutions Partners, Inc. and McGraw Communications Request for Special Temporary Authority to Operate Pending Approval of Domestic Application for Transfer of Assets of Company Holding Domestic 214 Authorization*. WC Docket No. 12-186, Request for Special Temporary Authority (filed June 22, 2012). Action on this domestic 214 application is without prejudice to Commission action on other proceedings or related applications and does not preclude or prejudice any enforcement action related to the unauthorized transfer of control.

McGraw is owned by the following U.S. Citizens: Francis X. Ahearn (43 percent equity); John Cunningham (43 percent equity); and Jay Monaghan (14 percent equity).

In July 2011, CSP decided to stop providing telecommunications services to its customers. McGraw began providing services to some of these customers, without prior authorization from the Commission, in December 2011. McGraw began billing them beginning January 1, 2012. Applicants state that the proposed transaction is entitled to presumptive streamlined treatment under section 63.03(b)(2)(i) of the Commission's rules³ and that a grant of the application will serve the public interest, convenience, and necessity.

Domestic Section 214 Application Filed for the Acquisition of Certain Assets of Communication Solutions Partners, Inc. by McGraw Communications, Inc., WC Docket No. 12-186 (filed June 22, 2012).

GENERAL INFORMATION

The transfer of control identified herein has been found, upon initial review, to be acceptable for filing as a streamlined application. The Commission reserves the right to return any transfer application if, upon further examination, it is determined to be defective and not in conformance with the Commission's rules and policies. Pursuant to section 63.03(a) of the Commission's rules, 47 CFR § 63.03(a), interested parties may file comments **on or before July 31, 2012**, and reply comments **on or before August 7, 2012**. Unless otherwise notified by the Commission, the Applicants may transfer control on the 31st day after the date of this notice.⁴ Comments should be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

In addition, e-mail one copy of each pleading to each of the following:

- 1) The Commission's duplicating contractor, Best Copy and Printing, Inc., fcc@bcpiweb.com; phone: (202) 488-5300; fax: (202) 488-5563;
- 2) Myrva Charles, Competition Policy Division, Wireline Competition Bureau, myrva.charles@fcc.gov;
- 3) Dennis Johnson, Competition Policy Division, Wireline Competition Bureau, dennis.johnson@fcc.gov;
- 4) David Krech, Policy Division, International Bureau, david.krech@fcc.gov; and
- 5) Jim Bird, Office of General Counsel, jim.bird@fcc.gov.

Filings and comments are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257,

³ 47 C.F.R. § 63.03(b)(2)(i).

⁴ Such authorization is conditioned upon receipt of any other necessary approvals from the Commission in connection with the proposed transaction.

Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554; telephone: (202) 488-5300; fax: (202) 488-5563; e-mail: fcc@bcpiweb.com; url: www.bcpiweb.com.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

For further information, please contact Myrva Charles at (202) 418-1506 or Dennis Johnson at (202) 418-0809.

- FCC -

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	)	File Nos.: EB-TCD-12-00000304,
	)	EB-TCD-12-00000440 ¹
Verizon)	
	)	Account No.: 201232170009
Compliance with the Commission's Rules and)	
Regulations Governing Customer Proprietary	)	FRN: 0016304214
Network Information and Toll Free Numbering)	

ADOPTING ORDER

Adopted: July 26, 2012

Released: July 26, 2012

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (Bureau) of the Federal Communications Commission and Verizon. The Consent Decree terminates the investigations initiated by the Bureau regarding Verizon's compliance with Sections 201(b) and 222(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201(b), 222(c)(1) and Sections 52.105 and 64.2010(f) of the Commission's rules, 47 C.F.R. §§ 52.105, 64.2010(f).

2. The Bureau and Verizon have negotiated the terms of the Consent Decree that resolves these matters. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the referenced investigations.

4. In the absence of material new evidence relating to this matter, we conclude that our investigations raise no substantial or material questions of fact as to whether Verizon possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED**, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the attached Consent Decree **IS ADOPTED**.

¹ In January 2011, the Telecommunications Consumers Division transitioned pending cases to a new electronic case management system. As part of that transition, cases received new, electronically assigned file numbers. The investigation now numbered EB-TCD-12-00000304 was formerly numbered EB-10-TC-445. The investigation now numbered EB-TCD-12-00000440 was previously numbered EB-11-TC-011.

6. **IT IS FURTHER ORDERED** that the above-captioned investigations **ARE TERMINATED**.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by First Class Mail and Certified Mail, Return Receipt Requested, to Tamara Preiss, Vice President, Federal Regulatory Affairs, 1300 I Street, NW, Suite 400 West, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	)	File Nos.: EB-TCD-12-00000304,
	)	EB-TCD-12-00000440 ²
Verizon)	
	)	Account No.: 201232170009
Compliance with the Commission's Rules and)	
Regulations Governing Customer Proprietary	)	FRN: 0016304214
Network Information and Toll Free Numbering)	

CONSENT DECREE

The Enforcement Bureau of the Federal Communications Commission and Verizon, by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau's investigations into potential violations by Verizon of Sections 201(b) and 222(c)(1) of the Communications Act of 1934, as amended,³ and Sections 52.105 and 64.2010(f) of the Commission's rules.⁴

I. DEFINITIONS

- I. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" or "Communications Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) "Adopting Order" means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Affiliate" shall have the same meaning defined in Section 153(1) of the Communications Act, 47 U.S.C. § 153(1).
 - (d) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (e) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.

² In January 2011, the Telecommunications Consumers Division transitioned pending cases to a new electronic case management system. As part of that transition, cases received new, electronically assigned file numbers. The investigation now numbered EB-TCD-12-00000304 was formerly numbered EB-10-TC-445. The investigation now numbered EB-TCD-12-00000440 was previously numbered EB-11-TC-011.

³ 47 U.S.C. §§ 201(b), 222(c)(1).

⁴ 47 C.F.R. §§ 52.105, 64.2010(f).

- (f) “Communications Laws” means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Verizon is subject by virtue of its business activities, including but not limited to Sections 201(b) and 222(c)(1) of the Act and Sections 52.105 and 64.2010(f) of the Rules.
- (g) “Compliance Plan” means the compliance obligations and compliance program described in this Consent Decree at paragraph 10.
- (h) “CPNI” shall have the meaning set forth at 47 C.F.R. § 222(h)(1).
- (i) “CPNI Investigation” means the investigation commenced by the Bureau’s LOI, dated May 3, 2011,⁵ regarding Verizon’s possible noncompliance with Section 222(c)(1) of the Act, 47 U.S.C. § 222(c)(1), and Section 64.2010(f) of the Commission’s rules, 47 C.F.R. § 64.2010(f).
- (j) “CPNI Rules” means the rules set forth at 47 C.F.R. § 64.2001 *et seq.* and any amendments or additions to those rules subsequent to the Effective Date.
- (k) “Effective Date” means the date on which the Bureau releases the Adopting Order.
- (l) “Investigations” means both the CPNI Investigation and the Toll Free Investigation.
- (m) “June 2010 Settlement” means the Consent Decree executed by and between the Bureau and Verizon, released on June 28, 2010, and set forth at 25 FCC Rcd 8019 (Enf. Bur. 2010).
- (n) “LOI” means letter of inquiry.
- (o) “Parties” means Verizon and the Bureau, each of which is a “Party.”
- (p) “RespOrg” or “Responsible Organization” shall have the meaning set forth at 47 C.F.R. § 52.101(b).
- (q) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (r) “Toll Free Number” shall have the meaning set forth at 47 C.F.R. § 52.101(f).
- (s) “Toll Free Number Investigation” means the investigation commenced by the Bureau’s LOI dated August 16, 2010, regarding Verizon’s possible noncompliance with Section 52.105 of the Rules.⁶

⁵ Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Tamara Preiss, Vice President, Federal Regulatory Affairs, Verizon (May 3, 2011) (on file in EB-11-TC-011).

⁶ Letter from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Verizon Select Services aka Verizon Business (Aug. 16, 2010) (on file in EB-10-TC-445).

- (t) “Toll Free Number Rules” means the rules set forth at 47 C.F.R. §§ 52.105–52.111 and any amendments or additions to those rules subsequent to the Effective Date.
- (u) “Verizon” or “Company” means the regulated, wholly owned subsidiaries of Verizon Communications Inc. and their successors and assigns.

II. BACKGROUND

2. Pursuant to Section 222 of the Act,⁷ the Commission has adopted rules to protect the confidentiality of customer proprietary network information (CPNI). Among other things, these rules generally require customer notification when a significant account change (SAC), such as a password change, occurs on a customer’s account.⁸

3. On June 28, 2010, Verizon entered into a consent decree with the Bureau that terminated another CPNI investigation.⁹ The compliance plan contained in the consent decree required Verizon to perform weekly checks for SAC transaction errors. Verizon was also required under the consent decree to report any noncompliance with the consent decree provisions to the Bureau. On March 9, 2011, Verizon informed the Bureau that its review had identified certain systems requiring modification to ensure that required SAC notices were timely sent to customers as required by the CPNI Rules.

4. The Bureau issued an LOI to Verizon on May 3, 2011.¹⁰ The Bureau met with Verizon on June 1, 2011, at which time Verizon detailed additional instances in which Verizon’s systems and processes required modification to ensure that SAC notices were sent to consumers. On June 10, 2011, Verizon submitted a letter detailing those additional issues.¹¹ Verizon submitted its response to the LOI on June 30, 2011.¹²

5. Section 52.105 of the Rules prohibits the warehousing of Toll Free Numbers. Warehousing, generally, is when a Responsible Organization reserves a Toll Free Number from the Toll Free Number database without having an actual subscriber for that Toll Free Number.¹³ To investigate potential violations by Verizon of the Toll Free Number Rules, on August 16, 2010, the Bureau issued an LOI to Verizon Select Services, Inc. (VSSI),¹⁴ and on September 29, 2010, a subpoena to

⁷ 47 U.S.C. § 222.

⁸ See 47 C.F.R. § 64.2010(f).

⁹ *Verizon*, Adopting Order and Consent Decree, 25 FCC Rcd 8019 (Enf. Bur. 2010).

¹⁰ See *supra* note 4.

¹¹ See Letter from Tamara Preiss, Vice President, Federal Regulatory Affairs, Verizon, to Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (June 10, 2011) (on file in EB-11-TC-011).

¹² Letter from Edward Shakin and Mark Montano, Verizon, to Kimberly A. Wild, Assistant Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (June 30, 2011) (on file in EB-11-TC-011). On August 3, 2011, and August 5, 2011, Verizon provided supplemental responses regarding data on SACs prior to January 1, 2010, for the portals or call centers that were included in their June 30, 2011, response.

¹³ See 47 C.F.R. § 52.105(a).

¹⁴ Letter from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Verizon Select Services aka Verizon Business (Aug. 16, 2010) (on file in EB-10-TC-445).

VSSI.¹⁵ Verizon provided information in response to the LOI and the subpoena on various dates.¹⁶ On March 18, 2011, the Bureau issued a second LOI,¹⁷ and on April 6, 2011, a second subpoena to Verizon.¹⁸ Verizon provided information in response to the second LOI and subpoena on various dates.¹⁹ According to Verizon's May 16, 2011, subpoena response, Verizon had reserved toll free numbers in advance of a subscriber request from 2005 to 2011.²⁰

III. TERMS OF AGREEMENT

6. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

7. **Jurisdiction.** Verizon agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree, and has the authority to enter into and adopt this Consent Decree.

8. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. Upon the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

9. **Termination of Investigations.** In express reliance on the covenants and representations in this Consent Decree, and to avoid further expenditure of public resources, the Bureau agrees to terminate the CPNI Investigation and the Toll Free Number Investigation. In consideration for the termination of the Investigations, Verizon agrees to the terms, conditions, and procedures contained herein. The Bureau agrees that absent new material evidence, it will not use the facts developed in the CPNI Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, or refer to the Commission, any new proceeding, formal or informal, or to take, on its own motion, or refer to the Commission, any action against Verizon concerning the matters that were the subject of the investigation or with respect to Verizon's basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission authorizations. The Bureau also agrees that absent new material evidence, it will not use the facts developed in the Toll Free Number Investigation through the

¹⁵ Letter from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Verizon Select Services aka Verizon Business (Sept. 29, 2010) (on file in EB-10-TC-445).

¹⁶ See Letter from Verizon to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Oct. 13, 2010) (on file in EB-10-TC-445); Letter from Verizon to Acting Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Oct. 6, 2010) (on file in EB-10-TC-445); Letter from Verizon to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Sept. 22, 2010) (on file in EB-10-TC-445).

¹⁷ Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Verizon (Mar. 18, 2011) (on file in EB-10-TC-445).

¹⁸ Letter from Suzanne M. Tetreault, Deputy Chief, FCC Enforcement Bureau, to Verizon (Apr. 6, 2011) (on file in EB-10-TC-445).

¹⁹ See Letter from Verizon to Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (May 16, 2011) (on file in EB-10-TC-445) (Supplemental Response); Letter from Verizon to Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Apr. 18, 2011) (on file in EB-10-TC-445).

²⁰ See Supplemental Response at 3.

Effective Date, or the existence of this Consent Decree, to institute, on its own motion, or refer to the Commission, any new proceeding, formal or informal, or to take, on its own motion, or refer to the Commission, any action against Verizon concerning the matters that were the subject of the investigation or with respect to Verizon's basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission authorizations.

10. **Compliance Plan.** For purposes of settling the matters set forth herein, Verizon shall within thirty (30) calendar days after the Effective Date, develop and implement a Compliance Plan relating to Verizon's future compliance with those portions of the Communications Laws relating to the CPNI Rules and Toll Free Number Rules, and with the terms and conditions of this Consent Decree. Verizon represents that it has one or more management employees in each of its business units who has responsibility for compliance with each of the Communications Laws that are relevant to its operations; that there are at least twenty (20) such management employees; and that, collectively, these management employees exercise responsibility for Verizon's compliance with all of the Communications Laws that are relevant to its operations. Verizon agrees that it will either maintain this compliance structure, or, if it makes changes, shall ensure that it maintains equivalent management oversight over compliance with all Communication Laws that are applicable to its operations. The Compliance Plan shall include, at a minimum, the following components:

- a) **Compliance Officer.** Within thirty (30) days of the Effective Date, Verizon shall designate two senior corporate managers to serve as the Compliance Officers for the CPNI Rules and Toll Free Number Rules issues, respectively. The Compliance Officers will be responsible for implementing and administering Verizon's Compliance Plan.
- b) **Notice of Consent Decree.** Within thirty (30) days after the Effective Date, Verizon shall notify all directors, officers (including the Compliance Officers), managers, and employees responsible for managing and overseeing Verizon's SAC notice procedures and toll free number reservation and assignment of the terms and conditions set forth herein.

CPNI

- c) **June 2010 Settlement Obligations.** Paragraph 9(B)-(E) of the June 2010 Settlement is hereby incorporated by reference and made a part of this Consent Decree, except for those portions of paragraph 9(B)-(E) that are unrelated to SAC notification.
- d) **SAC Compliance Review Prior to Material Changes.** Beginning sixty (60) days after the Effective Date, Verizon shall perform a monthly review of each of its mechanisms to disseminate SAC notices to its customers to ensure (1) that such mechanisms in fact are disseminating SAC notices as required by the CPNI Rules, and (2) that Verizon employees (including employees of Verizon Affiliates) responsible for managing and overseeing Verizon's SAC notice dissemination mechanisms are communicating effectively to all necessary personnel any changes to such mechanisms.
- e) **CPNI Training.** Within sixty (60) days after the Effective Date, Verizon shall reinforce its existing annual CPNI training and implement an SAC Notice Training Program for the Verizon employees (including employees of Verizon Affiliates) responsible for managing the process by which Verizon SAC notices are distributed to customers, as well as for any managers overseeing such employees. At a minimum, Verizon shall do the following:
 - i. Modify its training materials to place additional focus on the requirements of Section 64.2010(f).

- ii. Conduct training that
 - 1. Describes the requirements and prohibitions set forth in the CPNI Rules, in particular those set forth in Section 64.2010(f) and Section 64.2010(g); and
 - 2. Addresses the potential internal and regulatory consequences of failing to comply with the Commission's CPNI Rules and Verizon's methods and procedures concerning CPNI.
- iii. Provide the above-described training to new and reassigned employees responsible for developing or disseminating SAC notices within forty-five (45) days of when the employees assume such responsibilities, provided such date is no less than fifteen (15) days following the Effective Date.

Toll Free Numbers

- f) **Remedial Measures.** Within ten (10) days of the Effective Date, Verizon shall certify by letter to the Commission, directed to the Chief, Telecommunications Consumers Division, that as of April 18, 2011, Verizon has implemented changes to the process and procedures of Verizon's RespOrgs to ensure that none of Verizon's RespOrgs reserves or places in working status any Toll Free Number unless the Verizon RespOrg has a subscriber for whom it is reserving or placing the number in working status.
- g) **Toll Free Number Training.** Within sixty (60) days of the Effective Date, Verizon shall provide training to each Verizon employee (including employees of Verizon Affiliates) who is responsible for reserving any Toll Free Numbers or assigning any Toll Free Number to working status for Verizon RespOrgs. At a minimum, the training shall accomplish the following:
 - i. Describe the requirements and prohibitions set forth in the Toll Free Number Rules, in particular Section 52.105 and what it means for a RespOrg to have an "actual toll free subscriber" when reserving a toll free number or assigning it to working status.
 - ii. Address the potential internal and regulatory consequences of failing to comply with the Commission's Toll Free Rules and Verizon's methods and procedures concerning toll free numbers.
 - iii. Be provided to new and reassigned employees who are responsible for reserving any Toll Free Number or assigning any Toll Free Number to working status for Verizon RespOrg within forty-five (45) days of when the employees assume their Toll Free Numbering responsibilities, provided such date is no less than fifteen (15) days following the Effective Date.

Other Terms

- h) **Compliance Reports.** Verizon shall submit compliance reports to the Bureau six (6), twelve (12), eighteen (18), and twenty-four (24) months after the Effective Date (Compliance Reports).
 - i. Each Compliance Report shall include a certification by each Compliance Officer, as an agent of and on behalf of Verizon, stating that the Compliance Officer has personal knowledge that Verizon has established and implemented the Compliance Plan, and

after due inquiry is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 11.

- ii. The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and must comply with Section 1.16 of the Rules and be subscribed to as true under penalty of perjury in substantially the form set forth therein.
- iii. If the Compliance Officer is not able to so certify, the Compliance Officer, as an agent of and on behalf of Verizon, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully each instance of noncompliance; the steps Verizon has taken or will take to remedy such noncompliance, including the schedule on which Verizon will take the proposed remedial actions; and the steps Verizon has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which Verizon will take such preventive action.
- iv. All Compliance Reports shall be in writing and directed to the Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Verizon shall also send an electronic copy of each Compliance Report to Donna.Cyrus@fcc.gov and Andra.Cunningham@fcc.gov.
- i) **Termination.** The requirements relating to the Compliance Plan shall expire twenty-four (24) months after the Effective Date, except where this Consent Decree specifies a different time period.

11. **Reporting Noncompliance.** Verizon shall report any noncompliance with the terms and conditions of this Consent Decree (including paragraph 9(B)-(E) in the June 2010 Settlement that is incorporated by reference in this Consent Decree as set forth in paragraph 10(c) above), any noncompliance with Section 64.2010(f) of the Rules to the extent that such noncompliance is more than an anomaly, or any noncompliance with the Toll Free Number Rules, within fifteen (15) business days after discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of noncompliance, (ii) the steps that Verizon has taken or will take to remedy such noncompliance, (iii) the schedule on which Verizon will take the proposed remedial actions, and (iv) the steps that Verizon has taken or will take to prevent the recurrence of any such noncompliance. All reports of noncompliance shall be submitted to the Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Rm. 4-C224, Washington, DC 20554, with a copy submitted electronically to Donna.Cyrus@fcc.gov and Andra.Cunningham@fcc.gov. The reporting obligations set forth in this paragraph shall expire twenty-four (24) months after the Effective Date. In addition, beginning on the Effective Date, Verizon shall, at the request of the Bureau, meet with the Bureau once each 60-day period during the term of the Compliance Plan to discuss Verizon's adherence to the Compliance Plan and its performance under the CPNI Rules. Verizon agrees to provide the Bureau with information the Bureau requests concerning these topics.

12. **Voluntary Contribution.** Verizon agrees that it will make a voluntary contribution to the United States Treasury in the amount of nine hundred seventy thousand dollars (\$970,000) within thirty (30) calendar days after the Effective Date. Verizon shall also send electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance

Advice) must be submitted.²¹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. **Waivers.** Verizon waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order as defined herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order or Consent Decree, neither Verizon nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Verizon shall waive any statutory right to a trial de novo. Verizon hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

14. **Subsequent Rule or Order.** The Parties agree that if any provision of this Consent Decree conflicts with any subsequent Rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which Verizon does not expressly consent), such provision will be superseded by such Rule or order.

15. **Successors and Assigns.** Verizon agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

16. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties to the CPNI Investigation and the Toll Free Investigation.

17. **Modifications.** This Consent Decree cannot be modified or amended without the advance written consent of both Parties.

²¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

18. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

19. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to Section 208, of the Act, 47 U.S.C. § 208, against Verizon or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating evidence of noncompliance by Verizon of the Act or the Rules.

20. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

21. **Authorized Representative.** The individual signing this Consent Decree on behalf of Verizon represents and warrants that he or she is authorized by Verizon to execute this Consent Decree and to bind Verizon to the obligations set forth herein. The FCC signatory represents that she is signing this Consent Decree in her official capacity and that she is authorized to execute this Consent Decree.

22. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile or scanned form), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

For: Federal Communications Commission

P. Michele Ellison
Chief
Enforcement Bureau

Date

For: Verizon

Kathleen G. Ramsey
Associate General Counsel

Date

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
	)	File No.: EB-11-LA-0113
Spy Shop d/b/a)	
IQ Tronics, Inc.	)	Citation No.: C201232900001
SpyShopOne.com)	
SpyGadgetsShop.com)	
)	
Sherman Oaks, CA)	

CITATION AND ORDER

ILLEGAL MARKETING OF SIGNAL JAMMING DEVICES

Adopted: July 17, 2012**Released: July 18, 2012**

By the Acting District Director, Los Angeles Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. This is an official **CITATION AND ORDER** (Citation) issued pursuant to Section 503(b)(5) of the Communications Act of 1934, as amended (Communications Act),¹ to Spy Shop d/b/a IQ Tronics, Inc., SpyShopOne.com, and SpyGadgetsShop.com (collectively, Spy Shop) for marketing to consumers in the United States² unauthorized radio frequency devices – specifically cell phone, and Global Positioning System (GPS) and other signal jamming devices (collectively, signal jamming devices) – in violation of Section 302(b) of the Act,³ and Sections 2.803 and 15.201(b) of the Commission's rules (Rules).⁴

2. Spy Shop should take immediate steps to come into compliance and to avoid any recurrence of this misconduct, including actions such as removing illegal signal jamming devices from displays and declining to sell signal jamming devices in the United States. Signal jamming devices pose significant risks to public safety and potentially compromise other radio communications services. As explained below and as provided in the Communications Act, future violations of the Rules in this regard may subject Spy Shop to substantial monetary penalties, seizure of equipment, and criminal sanctions. Pursuant to Sections 4(i), 4(j), and 403 of the Communications Act,⁵ we also direct Spy Shop to confirm

¹ 47 U.S.C. § 503(b)(5).

² In very limited circumstances and consistent with applicable procurement requirements, retailers may market these devices to the U.S. federal government for authorized, official use. See 47 U.S.C. § 302a(c); see also 47 C.F.R. § 2.807(d).

³ 47 U.S.C. § 302a(b).

⁴ 47 C.F.R. §§ 2.803, 15.201(b).

⁵ 47 U.S.C. §§ 154(i) - (j), 403.

within thirty (30) calendar days after the release date of this Citation that it has ceased to market signal jamming devices and to provide information concerning its signal jamming device suppliers, distribution channels, and sales.

II. BACKGROUND

3. Spy Shop claims that it is the “leading distributor of video surveillance, counter-surveillance and personal protection equipment,” noting that it “has a broad and diverse range of products from leading manufacturers.”⁶ On July 8, 2011, in response to a complaint, an agent from the Enforcement Bureau’s Los Angeles Office (Los Angeles Office) visited the Spy Shop retail store located at 4499 Van Nuys Boulevard, Sherman Oaks, California. The agent observed that Spy Shop had two jamming devices on display. The first was a handheld device approximately the size of a package of cigarettes, with three external antennas attached to it. The device had no model number but was listed as having multi-band (Cellular, Global System for Mobile Communications (GSM), Personal Communications Service (PCS) and Long Term Evolution (LTE)) jamming capability with an effective jamming radius of 20 meters. It was offered for sale at \$299.00. The other device on display was listed as a GPS jammer and was in the shape of a car cigarette lighter with an external antenna attached. It also had an effective jamming radius of 20 meters and was offered for sale at \$99.00. The agent also observed a Spy Shop salesman demonstrating the signal jammers to customers in the store.⁷ The Spy Shop salesman offered to sell the agent signal jamming devices and also informed the agent that other models of cell phone and GPS jammers were available from the retail store.

4. The Los Angeles Office agent later visited Spy Shop’s online store, www.SpyShopOne.com, and observed that Spy Shop has marketed via the Internet within the past several months cell and GPS jamming devices to consumers in the United States.⁸ Specifically, the agent observed Spy Shop marketing various models of signal jamming devices including the two described above – *i.e.*, a “GPS Jammer,”⁹ “Small GPS Jammer”¹⁰ and “IQP1020, Portable Cellular Phone Jammer.”¹¹ The devices marketed were small and portable, and were offered for sale for prices ranging from \$99.99 to \$279.99.

III. APPLICABLE LAW AND VIOLATIONS

5. Federal law prohibits the marketing and operation of signal jamming devices in the United States and its territories. Section 333 of the Communications Act states that “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station

⁶ See <http://spyshopone.com/about-us-i-2.html> (last visited July 12, 2012) (listing location in Sherman Oaks, California).

⁷ We warn Spy Shop that it is a violation of federal law to use a cell or GPS jammer or any other type of device that blocks, jams or interferes with authorized communications, as well as to import, advertise, sell, or ship such a device. See 47 U.S.C. § 333 (prohibiting willful or malicious interference with the radio communications of any station licensed or authorized under the Communications Act or operated by the United States Government); 47 U.S.C. § 301 (requiring persons operating or using radio transmitters to be licensed or authorized under the Communications Act and the Commission’s rules).

⁸ See http://spyshopone.com/spy-gadgets-more-jammers-c-25_56.html (last visited July 12, 2012).

⁹ See <http://spyshopone.com/gps-jammer-p-297.html> (last visited July 12, 2012) (claiming that the main function of the device is as a “GPS Frequency Jammer” that works in the “1500-1600 MHz” band).

¹⁰ See <http://spyshopone.com/small-gps-jammer-p-431.html> (last visited July 12, 2012) (specifying the frequency as “GPS L1 System (1450-1600 MHz).

¹¹ See <http://spyshopone.com/iqp1020-p-550.html> (last visited July 12, 2012) (noting a “range up to 10 ft”).

licensed or authorized by or under this Act or operated by the United States Government.”¹² In addition, Section 302(b) of the Communications Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”¹³

6. The applicable implementing regulations for Section 302(b) are set forth in Sections 2.803, 15.201 and 15.3(o) of the Rules.¹⁴ Section 2.803(a)(1) of the Rules provides that:

no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless ... [i]n the case of a device subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter.¹⁵

Additionally, Section 2.803(g) of the Rules provides in relevant part that:

[R]adio frequency devices that could not be authorized or legally operated under the current rules ... shall not be operated, advertised, displayed, offered for sale or lease, sold or leased, or otherwise marketed absent a license issued under part 5 of this chapter or a special temporary authorization issued by the Commission.¹⁶

7. Pursuant to Section 15.201(b) of the Rules,¹⁷ intentional radiators¹⁸ like signal jamming devices cannot be marketed in the United States or its territories unless they have first been authorized in accordance with the Commission’s certification procedures. Section 2.803(e)(4) of the Rules defines “marketing” as the “sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment or distribution for the purpose of selling or leasing or offering for sale or lease.”¹⁹

8. Signal jamming devices, however, cannot be certified or authorized because their primary purpose is to block or interfere with authorized radio communications. As noted above, use of such a device is clearly prohibited by Section 333 of the Communications Act.²⁰ Thus, signal jamming devices such as those offered by Spy Shop cannot comply with the FCC’s technical standards and therefore cannot be marketed lawfully in the United States.²¹

9. Spy Shop has illegally marketed and continues to market signal jammers to consumers in the U.S. and its territories. As detailed above, on July 8, 2011, a Spy Shop salesman offered for sale signal jamming devices to agents from the Los Angeles Office in its retail store located at 4499 Van Nuys

¹² 47 U.S.C. § 333.

¹³ 47 U.S.C. § 302a(b).

¹⁴ 47 C.F.R. §§ 2.803, 15.201, and 15.3(o).

¹⁵ 47 C.F.R. § 2.803(a)(1).

¹⁶ 47 C.F.R. § 2.803(g).

¹⁷ 47 C.F.R. § 15.201(b).

¹⁸ An “intentional radiator” is a “device that intentionally generates and emits radio frequency energy by radiation or induction.” 47 C.F.R. § 15.3(o).

¹⁹ 47 C.F.R. § 2.803(e)(4).

²⁰ 47 U.S.C. § 333.

²¹ See *supra* note 2.

Boulevard, Sherman Oaks, California. As recently as July 12, 2012, Spy Shop also has offered for sale signal jamming devices through its online store.²² In fact, the devices marketed were expressly identified as jammers,²³ and the product information and specifications variously touted the devices as “small,” “portable,” and “easy to conceal.”²⁴ SpyShopOne.com also includes “Jammers” as a quick link on its navigation menu—presumably to more prominently display those products and make them easier for consumers to locate. In addition, we observed no statements or notices on the website indicating that Spy Shop, a U.S.-based retailer, would refuse to sell its signal jamming devices to unauthorized purchasers in the United States or its territories or would decline to complete any sales transactions originating with such consumers. To the contrary, it is clear that these devices were offered for sale to consumers in the United States. Spy Shop offers its website customers ground shipping in the United States as well as free store pickup at its Sherman Oaks location during regular business hours.²⁵

10. Accordingly, we find that Spy Shop has violated Section 302(b) of the Communications Act and Sections 2.803 and 15.201(b) of the Rules by marketing in the United States radio frequency devices that are not eligible for certification. We therefore issue this Citation to Spy Shop for violating the Rules and the Communications Act as discussed above. Spy Shop should take immediate steps to ensure that it does not continue to market these signal jamming devices or other signal jamming devices. This may include actions such as removing illegal signal jamming devices from its online websites and other displays, voluntarily surrendering existing inventory, and declining to sell signal jamming devices to consumers in the United States.²⁶

IV. FUTURE COMPLIANCE

11. If, after receipt of this Citation, Spy Shop violates the Communications Act or the Rules by marketing unauthorized radio frequency devices within the United States or its territories or otherwise engaging in conduct of the type described herein, the Commission may impose monetary forfeitures of up to \$16,000 for each such violation or, in the case of a continuing violation, the Commission may impose monetary forfeitures of up to \$16,000 for each day of such continuing violation up to a maximum forfeiture of \$112,500 for any single act or failure to act.²⁷ For instance, the Commission could impose separate forfeitures for each signal jamming device sold and/or for each day on which a signal jamming device is advertised or otherwise offered for sale. In addition, violations of the Communications Act or the Rules also can result in seizure of equipment through *in rem* forfeiture actions,²⁸ as well as criminal sanctions, including imprisonment.²⁹

²² See *supra* para. 4 and accompanying notes.

²³ See *supra* note 7.

²⁴ See *supra* notes 8-10.

²⁵ See SpyShopOne.com Terms and conditions, noting that “Most orders are shipped via UPS Ground service,” available at <http://spyshopone.com/terms-and-conditions-i-1.html>. We note that UPS only offers “UPS Ground” service within the United States and its territories. See http://www.ups.com/content/us/en/shipping/time/service/ground.html?srch_pos=2&srch_phr=ups+ground (stating the service area as “all 50 states and Puerto Rico”).

²⁶ *Id.*

²⁷ See 47 U.S.C. §§ 401, 501, 503; 47 C.F.R. § 1.80(b)(4). These amounts are subject to further adjustment for inflation (see 47 C.F.R. § 1.80(b)(6)), and the forfeiture amount applicable to any violation will be determined based on the statutory amount designated at the time of the violation.

²⁸ See 47 U.S.C. § 510.

²⁹ See *id.* §§ 401, 501.

12. In addition to providing the required information described in paragraph 16 below, Spy Shop may respond to this Citation within thirty (30) calendar days after the release date of this Citation either through (1) a personal interview at the closest FCC office, or (2) a written statement. Any written statement should specify the actions taken by Spy Shop to ensure that it does not violate the Communications Act or the Commission's rules governing the marketing of signal jamming devices and other radio frequency devices in the future. Please reference file number EB-11-LA-0113 when corresponding with the Commission.

13. Under the Privacy Act of 1974, any statement or information provided by you may be used by the Commission to determine if further enforcement action is required.³⁰ Any knowingly or willfully false statement, or concealment of any material fact, made in reply to this Citation is punishable by fine or imprisonment.³¹ Please also note that Section 1.17 of the Rules requires that you provide truthful and accurate statements to the Commission.³²

V. CONTACT INFORMATION

14. The closest FCC Office is the Los Angeles District Office in Cerritos, California. Spy Shop may contact Paul Oei by telephone, 562-860-7474, to schedule a personal interview, which must take place within thirty (30) calendar days after the release date of this Citation. Spy Shop also should send any written statement within thirty (30) calendar days after the release date of this Citation to:

Paul Oei
Federal Communications Commission
Los Angeles Office
18000 Studebaker Road, Suite 660
Cerritos, CA 90703
Re: EB-11-LA-0113

15. Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five (5) business days advance notice; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):
202-418-0531 (voice), 202-418-7365 (tty).

³⁰ See Privacy Act of 1974, 5 U.S.C. § 552a(c)(3).

³¹ See 18 U.S.C. § 1001 *et seq.*

³² 47 C.F.R. § 1.17 ("... no person subject to this rule shall: (1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.").

VI. REQUEST FOR INFORMATION

16. Pursuant to Sections 4(i), 4(j), and 403 of the Communications Act,³³ Spy Shop is directed to provide the information requested in non-public Appendix A attached hereto within thirty (30) calendar days after the release date of this Citation. The request for information concerns Spy Shop's signal jamming suppliers and sales as well as the disposition of its signal jamming device inventory. A failure to respond, or an inadequate, incomplete, or misleading response, may subject Spy Shop to additional sanctions.³⁴

VII. ORDERING CLAUSES

17. **IT IS ORDERED** that pursuant to Sections 4(i), 4(j), and 403 of the Communications Act, Spy Shop must provide the information requested in paragraph 15 and non-public Appendix A to this Citation and Order. The response to the Request for Information must be provided in the manner indicated herein and must be received by the FCC within thirty (30) calendar days after the release date of this Citation and Order.

18. **IT IS FURTHER ORDERED** that a copy of this Citation and Order shall be sent both by First Class U.S. Mail and Certified Mail, Return Receipt Requested to Spy Shop at 4499 Van Nuys Blvd., Sherman Oaks, California 91403.

FEDERAL COMMUNICATIONS COMMISSION

Paul Oei
Acting District Director
Los Angeles Office
Western Region
Enforcement Bureau

³³ 47 U.S.C. §§ 154(i), 154(j), 403.

³⁴ See, e.g., *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7599-7600, paras. 23-28 (2002) (\$100,000 forfeiture for egregious and intentional misconduct, i.e., refusing to attest to truthfulness and accuracy of responses to a Letter Inquiry (LOI)); *Connect Paging, Inc. d/b/a Get A Phone*, Forfeiture Order, 22 FCC Rcd 15146 (Enf. Bur. 2007) (\$4,000 forfeiture for failure to respond to an LOI); *BigZoo.Com Corporation*, Order of Forfeiture, 20 FCC Rcd 3954 (Enf. Bur. 2005) (\$20,000 forfeiture for failure to respond to a USF LOI); *Donald W. Kaminski, Jr.*, Forfeiture Order, 18 FCC Rcd 26065 (Enf. Bur. 2003) (\$4,000 forfeiture for failure to respond to an LOI); *World Communications Satellite Systems, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 18545 (Enf. Bur. 2003) (\$10,000 forfeiture for a non-responsive reply to an LOI); *Digital Antenna, Inc., Sunrise, Florida*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7600 (Spectrum Enf. Div., Enf. Bur. 2007) (\$11,000 forfeiture for failure to provide complete responses to an LOI).



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
TTY 202 / 418-2555
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

DA 12-1148
Released: July 18, 2012

WIRELINE COMPETITION BUREAU ANNOUNCES CARRY-FORWARD OF UNUSED SCHOOLS AND LIBRARIES UNIVERSAL SERVICE FUNDS FOR FUNDING YEAR 2012

CC Docket No. 02-6

Pursuant to section 54.709(a)(3) of the Commission's rules,¹ on April 26, 2012, the Universal Service Administrative Company (USAC) submitted projections of demand and administrative expenses for the federal Universal Service Fund for the third quarter of 2012.² According to USAC's projections, \$400 million in unused funds from funding years 2003-2010 is available to carry forward to increase disbursements to schools and libraries via the E-rate program, more formally known as the schools and libraries universal service program.³ In addition, while preparing projections of demand and administrative expenses for the federal Universal Service Fund for the fourth quarter of 2012, USAC identified another \$650 million available to be carried forward, for a total of \$1.050 billion in funding available for funding year 2012.⁴ Section 54.507(a)(3) of the Commission's rules states that "[a]ll funds collected that are unused shall be carried forward into subsequent funding years for use in the [E-rate program] in accordance with the public interest and notwithstanding the annual cap."⁵

Consistent with the Commission's rules, the Wireline Competition Bureau announces that \$1.050 billion in unused funds will be carried forward to increase disbursements to schools and libraries in funding year 2012 in excess of the annual cap.⁶

¹ 47 C.F.R. § 54.709(a)(3).

² See Federal Universal Service Support Mechanisms Fund Size Projections for Third Quarter 2012, available at <http://www.usac.org/about/tools/fcc/filings/2012/Q3/USAC%203Q2012%20Federal%20Universal%20Service%20Mechanism%20Quarterly%20Demand%20Filing.pdf>.

³ *Id.* at 38.

⁴ Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Chief, Wireline Competition Bureau, FCC (dated July 10, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021985425>. USAC's Universal Service Support Mechanism Fund Size Projections for the Fourth Quarter 2012 is due to be submitted to the Commission Aug. 2, 2012. *Id.*

⁵ 47 C.F.R. § 54.507(a)(3). See also *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Red 26912, 26933-35, paras. 52-57 (2003) (amending section 54.507(a) of the Commission's rules).

⁶ The 2012 funding year for purposes of the schools and libraries cap is July 1, 2012 to June 30, 2013. See 47 C.F.R. § 54.507(b).

For further information, please contact James Bachtell, Wireline Competition Bureau at (202) 418-7400 or TTY (202) 418-0484.

- FCC -

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
JMK Communications Inc.	)	File No.: EB-11-CF-0110
	)	NAL/Acct. No.: 201232340001
Licensee of Station WPWC(AM)	)	FRN No: 0007309503
Dumfries, Virginia	)	Facility ID: 25995
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 17, 2012

Released: July 18, 2012

By the District Director, Columbia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that JMK Communications Inc. (JMK), licensee of AM Station WPWC, in Dumfries, Virginia (Station), apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules)¹ by failing to enclose the Station's antenna structures within effective locked fences or other enclosures. We conclude that JMK is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000). We further direct JMK to submit, no later than thirty (30) calendar days from the release date of this NAL, a written statement signed under penalty of perjury stating that the Station is now in compliance with Section 73.49 of the Rules.

II. BACKGROUND

2. On September 2, 2011, in response to a complaint, an agent from the Enforcement Bureau's Columbia Office inspected the Station's four-tower array in Dumfries, Virginia.² All four antenna structures have radio frequency potential at their base. The agent observed that one of the antenna structures had no fencing at all around the base of the structure, while the other three antenna structures had only partial fencing around their bases, thereby allowing unrestricted access to all the structures. The level of deterioration observed by the agent indicated that the fences had been in that condition for a significant period of time. The agent also observed that there was no perimeter fence around the property where the antenna structures were located.

III. DISCUSSION

3. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or

¹ 47 C.F.R. § 73.49.

² At the time of the inspection, the antenna structure registration numbers were not posted at the base of the structures. The agent later determined that the following registration numbers are associated with the Station's antenna structures: 1022267, 1022268, 1022269, and 1022270.

order issued by the Commission thereunder, shall be liable for a forfeiture penalty.³ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁴ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁵ and the Commission has so interpreted the term in the Section 503(b) context.⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁷ The term "repeated" means the commission or omission of such act more than once or for more than one day.⁸

A. Failure to Enclose the Antenna Structure Within an Effective Locked Fence

4. The evidence in this case is sufficient to establish that JMK violated Section 73.49 of the Rules. Section 73.49 of the Rules requires that antenna structures having radio frequency potential at the base must be enclosed within effective locked fences or other enclosures.⁹ On September 2, 2011, agents from the Columbia Office observed that one of the Station's antenna structures had no fencing and the other three antenna structures had only partial fencing. Based on the degree of deterioration, agents concluded that the fences had been in disrepair for an extended period of time. Agents also did not observe a perimeter fence. Accordingly, based on the evidence before us, we find that JMK apparently willfully and repeatedly violated Section 73.49 of the Rules by failing to enclose the Station's antenna structures within effective locked fences or other enclosures.

B. Proposed Forfeiture and Reporting Requirement

5. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failure to maintain an effective AM tower fence is \$7,000.¹⁰ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and

³ 47 U.S.C. § 503(b).

⁴ 47 U.S.C. § 312(f)(1).

⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

⁶ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁷ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁹ 47 C.F.R. § 73.49.

¹⁰ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

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with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹¹ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that JMK is apparently liable for a forfeiture in the amount of \$7,000.¹²

6. We direct JMK to submit a statement, pursuant to Section 1.16 of the Rules¹³ signed under penalty of perjury by an officer or director of JMK stating that it is now in compliance with Section 73.49 of the Rules.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204(b), 0.311, 0.314 and 1.80 of the Commission's rules, JMK Communications Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seven thousand dollars (\$7,000) for violations of Section 73.49 of the Rules.¹⁴

8. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order, JMK Communications Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. **IT IS FURTHER ORDERED** that JMK Communications Inc. **SHALL SUBMIT** a written statement as described in paragraph 6 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Northeast Region, Columbia Office, 9200 Farm House Lane, Columbia, Maryland 21046 and include the NAL/Acct. No. referenced in the caption. JMK Communications, Inc. shall also e-mail the written statement to NER-Response@fcc.gov.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. JMK shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-

¹¹ 47 U.S.C. § 503(b)(2)(E).

¹² See, e.g., *Patrick H. Sickafus*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 6818 (Enf. Bur. 2011) (proposing \$7,000 base forfeiture for failure to maintain effective locked fences surrounding two antenna structures in a three-tower array) (forfeiture paid).

¹³ 47 C.F.R. § 1.16.

¹⁴ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.204(b), 0.311, 0.314, 1.80, 73.49.

¹⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

GL, 1005 Convention Plaza, St. Louis, MO 63101.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.¹⁷ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Columbia Office, 9200 Farm House Lane, Columbia, Maryland 21046 and include the NAL/Acct. No. referenced in the caption. JMK Communications Inc. also shall e-mail the written response to NER-Response@fcc.gov.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and first class mail, to JMK Communications Inc., 4525 Wilshire Boulevard, Los Angeles, California 90010.

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Salomon Satche
District Director
Columbia Office
Northeast Region
Enforcement Bureau

¹⁶ See 47 C.F.R. § 1.1914.

¹⁷ 47 C.F.R. §§ 1.16, 1.80(f)(3).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Super Towers, Inc.	)	File No.: EB-11-TP-0142
	)	NAL/Acct. No.: 201232700006
Owner of Antenna Structure Number 1027587	)	FRN: 0019442458
Bonita Springs, Florida)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 18, 2012

Released: July 18, 2012

By the District Director, Tampa Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Super Towers, Inc. (Super Towers), owner of antenna structure number 1027587 (the Antenna Structure), in Bonita Springs, Florida, apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act), and Sections 17.47(a), 17.48(a), and 17.51(a) of the Commission's rules (Rules)¹ by failing to (1) exhibit red obstruction lighting from sunset to sunrise, (2) notify the Federal Aviation Administration (FAA) of a known lighting outage, and (3) monitor the antenna structure lighting on a daily basis. We conclude that Super Towers is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000). In addition, we direct Super Towers to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury stating that it complies with the Commission's antenna structure lighting, notification, and monitoring requirements.

II. BACKGROUND

2. Antenna structure number 1027587 is 223.7 meters in overall height above ground and is required to be painted and lighted.² On December 8, and again on December 15, 2011, in response to a complaint, an agent from the Enforcement Bureau's Tampa Office (Tampa Office) inspected the Antenna Structure after sunset and observed that the top red obstruction light was not lighted.³ On December 8, 2011, the agent contacted the FAA and determined that Super Towers had not notified the FAA of the light outage.⁴

¹ 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.47(a), 17.48(a), 17.51(a).

² See 47 C.F.R. § 17.21(a) (requiring antenna structures more than 60.96 meters in height above the ground to be painted and lighted). See also Antenna Structure Registration database for antenna structure number 1027587.

³ Local sunset time was 5:34 p.m. EST.

⁴ An agent from the Tampa Office notified the FAA of the lighting outage and the FAA issued a Notice to Airmen (NOTAM) for the Antenna Structure on December 8, 2011.

3. On December 16, 2011, an agent from the Tampa Office telephoned Super Towers and spoke with its contract engineer/on scene representative. The contract engineer stated that Super Towers learned of the light outage on the Antenna Structure on December 15, 2011 from a tenant on the structure. Super Towers also stated that (1) the structure did not have an alarm system to monitor the lights, (2) it relied on an "unreliable local" to observe the lights on a daily basis, and (3) it had not contacted the FAA concerning the light outage.

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁵ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁶ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁷ and the Commission has so interpreted the term in the Section 503(b) context.⁸ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁹ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹⁰

A. Failure to Monitor and Exhibit Required Obstruction Lighting on the Antenna Structure and Notify the FAA of the Lighting Outage

5. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.¹¹ Section 17.51(a) of the Rules states that "[a]ll red obstruction lighting shall be exhibited from sunset until sunrise unless otherwise specified."¹² Section 17.47(a) of the Rules states that owners of antenna structures "(1) shall make an observation of the antenna structure's lights at least once each 24 hours either visually . . . to insure that all such lights are functioning properly as required; or alternatively (2) shall provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication

⁵ 47 U.S.C. § 503(b).

⁶ 47 U.S.C. § 312(f)(1).

⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

⁸ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹⁰ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹¹ 47 U.S.C. § 303(q).

¹² 47 C.F.R. § 17.51(a).

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of such failure to the owner.”¹³ Section 17.48(a) of the Rules states that owners of antenna structures “shall report immediately by telephone or telegraph to the nearest Flight Service Station or office of the Federal Aviation Administration any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes”¹⁴

6. On December 8, and again on December 15, 2011, an agent from the Tampa Office observed that the required top red obstruction light on the Antenna Structure was extinguished after sunset. During a telephone conversation with an agent on December 16, 2011, Super Towers admitted that (1) it had learned of the light outage on the previous day, (2) it was not observing the structure's lights once every 24 hours and had no automatic alarm system, and (3) it had not previously notified the FAA of the outage. Based on the evidence before us, we find that Super Towers apparently willfully and repeatedly violated Section 303(q) of the Act and Sections 17.47(a), 17.48(a) and 17.51(a) of the Rules by failing to (1) exhibit all required red obstruction lighting from sunset to sunrise on the Antenna Structure, (2) report the light outage to the FAA, and (3) monitor the Antenna Structure's lights as required.

B. Proposed Forfeiture Amount and Reporting Requirement

7. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed lighting and marking is \$10,000.¹⁵ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Super Towers is apparently liable for a total forfeiture in the amount of \$10,000.

8. We direct Super Towers to submit a written statement, pursuant to Section 1.16 of the Rules,¹⁷ signed under penalty of perjury by an officer or director of Super Towers, stating that the lights on the Antenna Structure have been restored, including the date of restoration, or setting forth the timeframe for when the lights on the Antenna Structure will be repaired or replaced. Super Towers shall also certify that it will notify the FAA to ensure a NOTAM remains in place until the antenna structure lights are restored. In addition, Super Towers shall state that it now complies, or describe the steps it will take to comply, with the Section 17.47 monitoring requirements. This statement must be provided to the Tampa Office at the address listed in paragraph 11 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314 and 1.80 of the Commission's rules, Super Towers, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in

¹³ 47 C.F.R. § 17.47(a).

¹⁴ 47 C.F.R. § 17.48(a).

¹⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ 47 C.F.R. § 1.16.

the amount of ten thousand dollars (\$10,000) for violations of Section 303(q) of the Act and Sections 17.47(a), 17.48(a), and 17.51(a) of the Commission's rules.¹⁸

10. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Super Towers, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. **IT IS FURTHER ORDERED** that Super Towers, Inc. **SHALL SUBMIT** a statement as described in paragraph 8 to the Tampa Office within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Tampa Office, 4010 West Boy Scout Blvd. Suite 425, Tampa, Florida, 33607. Super Towers, Inc. shall also e-mail the written statement to SCR-Response@fcc.gov.

12. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Super Towers, Inc. shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

13. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

¹⁸ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.47(a), 17.48(a), 17.51(a).

¹⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁰ See 47 C.F.R. § 1.1914.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.²¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Tampa Office, 4010 West Boy Scout Blvd. Suite 425, Tampa, Florida, 33607 and include the NAL/Acct. No. referenced in the caption. Super Towers, Inc. also shall email the written response to SCR-Response@fcc.gov.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Super Towers, Inc. at 17 Crooked LN, Manchester, MA 01944.

FEDERAL COMMUNICATIONS COMMISSION

Ralph Barlow
District Director
Tampa Office
South Central Region
Enforcement Bureau

²¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
TENNESSEE HOMELAND SECURITY	)	File Nos. 0003818256, 0003818261
DISTRICT 7)	
)	
Request for Waiver of Sections 20.9(a)(6) and)	
22.561 of the Commission's Rules)	

ORDER

Adopted: July 17, 2012

Released: July 18, 2012

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The Tennessee Homeland Security District 7, (the District) filed two applications and an associated waiver request¹ for authority to use, for public safety communications purposes, eighteen Part 22 Paging and Radiotelephone Service channel pairs at multiple location sites in Basic Economic Area (BEA) Nos. 71, 72 and 73.² The District seeks waiver of Sections 20.9(a)(6) and 22.561³ to use these frequencies pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act),⁴ or in the alternative, Section 1.925 of the Commission's rules.⁵ As further detailed below, we find that the District does not satisfy the waiver criteria pursuant to either Section 337 of the Act or Section 1.925 because the Commission has awarded the channel pairs to winning bidders in Auction 87. Accordingly, we deny the District's waiver request and dismiss the applications.

II. BACKGROUND

2. The District is located north and west of Nashville, Tennessee, and consists of Cheatham, Dickson, Houston, Humphreys, Montgomery, Robertson, and Stewart Counties in Tennessee, as well as Fort Campbell, a military installation that spans the Kentucky/Tennessee border.⁶ The District was

¹ See File Nos. 0003818256 (filed April 24, 2009, amended July 15, 2009, July 29, 2009, August 14, 2009, January 7, 2010, and January 8, 2010) and 0003818261 (filed April 24, 2009, amended July 15, 2009, July 29, 2009, January 8, 2010, and February 8, 2010) and associated attachments "Request for Waiver" (Waiver Request), "APCO AFC, Inc. Frequency Search Results" (Frequency Search), Letter from Wendy Caruthers, Engineering Coordination Specialist, Association of Public-Safety Communications Officials-International, Inc. to Federal Communications Commission (dated April 2, 2009) (APCO Letter), Letters from Ken Hunt, Comserv Services, LLC and Ken Hunt, KTI, Inc. (dated Feb. 28, 2009) (Concurrence Letters), "Tennessee Homeland Security District 7 LOC's Requested" (LOC's Requested), and "Further Supplement to Request for Waiver" filed July 29, 2009 (Further Supplement).

² See LOC's Requested at 1-2. See also Frequency Information attached to File Nos. 0003818256 and 0003818261.

³ 47 C.F.R. §§ 20.9(a)(6) and 22.561.

⁴ 47 U.S.C. § 337(c).

⁵ 47 C.F.R. § 1.925; Waiver Request at 1.

⁶ Waiver Request at 2.

created in 2003 to promote greater interoperability among federal, state and local public safety agencies in the region. In 2004, the District began construction of a "Wide Area Trunking Emergency Communications System" (System), funded by both the U.S. Department of Homeland Security and local governments in 2004.⁷ The System design utilizes twenty-two UHF (450-470 MHz) sites in a trunked configuration, with microwave links connecting each site to wide area network communications.⁸ The District states that it has constructed seventeen sites and purchased infrastructure for the remaining five sites.⁹

3. The District contends that there is a shortfall of available public safety channels to meet the system's operational requirements.¹⁰ Furthermore, the District has submitted a frequency study indicating that "there are no remaining Public Safety Pool channels available to the District in the UHF band."¹¹ The District therefore seeks access to certain unassigned Part 22 paging channels and argues that "[t]hese channels are vitally needed to make this system robust enough to handle current demands and future loading requirements."¹² The District obtained concurrence letters from pre-Auction 87, incumbent licensees Comserv Services, LLC and KTI, Inc.¹³ However, the proposed frequencies are not allocated for public safety private land mobile use and accordingly, the District requests a waiver of Sections 20.9(a)(6) and 22.561 of the Commission's rules.¹⁴

4. On August 12, 2010, while the District's waiver request was pending, the Wireless Telecommunications Bureau (WTB) announced the winning bidders for Auction 87.¹⁵ Subsequently, WTB granted licenses for the same Channel Blocks and BEAs sought by the District to the applicable winning bidders.¹⁶

III. DISCUSSION

5. Section 337(c) of the Act provides that the Commission "shall waive . . . its regulations implementing th[e] Act (other than its regulations regarding harmful interference) to the extent necessary to permit" entities "seeking to provide public safety services" to use unassigned spectrum not allocated to public safety if the Commission makes five specific findings: (i) no other spectrum allocated to public

⁷ *Id.* at 1-2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.* at 2-3.

¹¹ *Id.* See also APCO Letter and Frequency Search.

¹² Waiver Request at 3.

¹³ See Concurrence Letters. Comserv Services, LLC is licensed in BEA 73 on six of the channel pairs sought by the District. KTI, Inc. is also licensed in BEA 73 on one channel pair sought by the District. See also call signs WPVQ457 and WPZN568.

¹⁴ *Id.* at 1-3. See also 47 C.F.R. §§ 20.9(a)(6) and 22.561. Section 20.9(a)(6) provides that these frequencies shall be regulated as a commercial mobile radio service. Section 22.561, which specifies that channels be allocated for paired assignment to transmitters that provide or support (or support other transmitters that provide) one-way or two-way public mobile service.

¹⁵ See Auction of Lower and Upper Paging Bands Licenses Closes, Winning Bidders Announced for Auction 87, *Public Notice*, 25 FCC Rcd 18164 (WTB 2010) (*Auction 87 Closing Public Notice*).

¹⁶ See Appendix A for the list of the licenses.

safety services is immediately available to satisfy the requested public safety service use; (ii) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations; (iii) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.¹⁷

6. As a threshold matter, we find that the District's request for relief fails to satisfy the requirement pursuant to Section 337(c)(1) that the requested frequencies be "unassigned."¹⁸ The frequencies the District requested are located in BEAs 71, 72 and 73. The Commission previously awarded the channels in these BEAs to winning bidders Central Vermont Communications, Inc., Buttner Holdings, LLC, and KTI, Inc., in Auction 87.¹⁹ Based on our analysis, in cases where the District has concurrence from an incumbent licensee, each base station would cover an area in more than one BEA. The result is that no base station – channel block combination could be used without having impact on an auction-winning licensee.²⁰ Because the District's request fails to seek waiver relief for "unassigned" spectrum, we decline to grant its request pursuant to Section 337(c) and, accordingly, we need not address the District's arguments regarding the five criteria of Section 337(c)(1) of the Act.²¹

7. In addition, we find that the District has not met the standard for waiver relief under Section 1.925. We find that grant of the waiver request would not be in the public interest, because of the potential for harmful interference the District's operations would cause to the primary, geographic-area licensees Central Vermont Communications, Inc., Buttner Holdings, LLC, and KTI, Inc. We therefore deny the waiver request and dismiss the applications. We appreciate and commend the District's commitment to support public safety radio communications in the region. However, the fact remains that the requested frequencies are no longer available for assignment. While we decline to grant the District's request, we note that in addition to seeking other frequencies, another alternative available to the District would be to seek use of the assigned frequencies through partition or disaggregation.

¹⁷ 47 U.S.C. § 337(c).

¹⁸ U.S.C. § 337(c)(1).

¹⁹ See *Auction 87 Closing Public Notice*, Attachment A.

²⁰ For example, on File No. 000318256, the site-channel combination of Location 2 (Scarborough), frequency pair 454.075 / 459.075 MHz (Channel Block GC) would serve an area covering portions of BEAs 71 and 73. See LOC's Requested. For this site-channel combination, the District notes that it has concurrence from Comserv Services, LLC (Comserv). See *id.* However, Comserv's license, call sign WPVQ473, operates on Channel Block GC only in BEA 73, not in BEA 71. Because the District's Location 2 would also cover BEA 71, we must also consider that the license for BEA 71, Channel Block GC was awarded by auction to Central Vermont Communications, Inc., who has not given concurrence to the District. Thus, this site-channel combination is already assigned for the purpose of Section 337.

²¹ See, e.g., *City of El Segundo, Order*, 19 FCC Rcd 6992, 6995-6 ¶ 8 (WTB PSCID 2004), ("Because El Segundo has failed to satisfy the prerequisite criterion that the spectrum be unassigned, we need not address its arguments regarding the five criteria under Section 337(c)(1) of the Act.").

IV. CONCLUSION

8. Based on the record before us, we find that the District does not satisfy the waiver criteria pursuant to either Section 337(c) of the Act or Section 1.925 of our rules. Therefore, we deny the waiver and dismiss the captioned applications.

V. ORDERING CLAUSES

9. Accordingly, WE ORDER that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the request for waiver associated with the captioned applications filed by the Tennessee Homeland Security District 7, on April 24, 2009, IS DENIED, and the captioned applications ARE DISMISSED consistent with this *Order* and the Commission's rules.

10. We take this action under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

Appendix A

District File No.	Site #	Base Frequency (MHz)	Affected Market and Channel Block	Auc. 87 new licensee	Existing licensee ²²	Call sign
0003818256	1	454.025	BEA071-GA	CVC ²³		WQMT828
0003818256	1	454.175	BEA071-GG	CVC		WQMT832
				Buttner Holdings, LLC		WQMT706
0003818256	1	454.425	BEA071-GQ	CVC		WQMT829
0003818256	2 ²⁴	454.075	BEA071-GC		Comserv Services, LLC	WPVQ473
0003818256	2	454.075	BEA073-GC			
				Buttner Holdings, LLC		WQMT712
0003818256	2	454.600	BEA071-GX		Comserv Services, LLC	WPVQ457
0003818256	2	454.600	BEA073-GX			WQMT830
0003818256	3	454.125	BEA071-GE	CVC		
				Buttner Holdings, LLC		WQMT705
0003818256	3	454.400	BEA071-GP	CVC		WQMT831
0003818256	4	454.150	BEA071-GF	CVC		WQMT833
0003818256	5	454.200	BEA071-GH		KTI, Inc.	WPZN568
0003818256	5	454.200	BEA073-GH			
				Buttner Holdings, LLC		WQMT704
0003818256	5	454.375	BEA071-GO		Comserv Services, LLC	WPVQ467
0003818256	5	454.375	BEA073-GO			
				Buttner Holdings, LLC		WQMT707
0003818256	5	454.450	BEA071-GR		Comserv Services, LLC	WPVQ470
0003818256	5	454.450	BEA073-GR			WQMT835
0003818256	6	454.250	BEA071-GJ	CVC		
0003818256	6	454.250	BEA072-GJ	[not auctioned]		
0003818256	6	454.250	BEA073-GJ		Comserv Services, LLC	WPVQ463
				Buttner Holdings, LLC		WQMT714
0003818256	6	454.650	BEA071-GZ			
0003818256	6	454.650	BEA072-GZ	[not auctioned]		
0003818256	6	454.650	BEA073-GZ	KTI, Inc.		WQMT884
0003818261	1	454.300	BEA071-GL	CVC		WQMT836
				Buttner Holdings, LLC		WQMT708
0003818261	2	454.475	BEA071-GS			
				Buttner Holdings, LLC		WQMT712
0003818261	3	454.575	BEA071-GW			
0003818261	3	454.575	BEA072-GW	[not auctioned]		
0003818261	3	454.575	BEA073-GW		Comserv Services, LLC	WPVQ472
				Buttner Holdings, LLC		WQMT709

²² Licensees in this column obtained their licenses prior to Auction 87 and have provided concurrences to the District. See *supra* n. 1 and n. 13.

²³ "CVC" is Central Vermont Communications, Inc.

²⁴ Boldfaced font indicates that the District's particular site-channel combination affects more than one Market-Channel Block. In every case, at least one affected Market-Channel Block is now assigned to an Auction 87 licensee.

Federal Communications Commission

DA 12-1151

0003818261	4	454.500	BEA072-GT	[not auctioned]	
0003818261	4	454.500	BEA073-GT	KTl, Inc. Buttner	WQMT883
0003818261	5	454.525	BEA071-GU	Holdings, LLC Buttner	WQMT706
0003818261	6	454.625	BEA071-GY	Holdings, LLC	WQMT713

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Wagenvoord Advertising Group, Inc.	)	File No.: EB-FIELDSCR-12-00000481
	)	NAL/Acct. No.: 201232620003
Licensee of Radio Station KLRG-AM	)	FRN: 0010300747
Sheridan, AR	)	Facility ID No.: 14053
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 19, 2012

Released: July 19, 2012

By the District Director, New Orleans Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Wagenvoord Advertising Group, Inc. (Wagenvoord), licensee of Station KLRG-AM (Station), in Sheridan, Arkansas, apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules)¹ by failing to have an effective locked fence or other enclosure around its antenna structure. We conclude that Wagenvoord is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000). In addition, we direct Wagenvoord to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury stating that its antenna structure complies with the Commission's fencing requirements.

II. BACKGROUND

2. On January 24, 2012, in response to a complaint, agents from the Enforcement Bureau's New Orleans Office (New Orleans Office) inspected the Station's antenna structure, while the station was in operation, and observed that over half of the fence surrounding the base of the antenna structure was lying on the ground. The agents also observed that there was no fence surrounding the perimeter of the property.

3. On January 25, 2012, agents from the New Orleans Office, accompanied by the Station's engineer, conducted an inspection of Station KLRG-AM's antenna structure while the station was in operation. Agents again observed that over half of the fence surrounding the Station's antenna structure was lying on the ground. The Station's engineer stated that he had noticed that the fence was down approximately two weeks prior to the inspection.

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or

¹ 47 C.F.R. § 73.49.

THE OHIO STATE UNIVERSITY
HOSPITALITY DEPARTMENT

order issued by the Commission thereunder, shall be liable for a forfeiture penalty.² Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁴ and the Commission has so interpreted the term in the Section 503(b) context.⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁷

A. Failure to Enclose the Antenna Structure Within an Effective Locked Fence or Other Enclosure

5. Section 73.49 of the Rules states that antenna structures “having radio frequency potential at the base . . . must be enclosed within effective locked fences or other enclosures.”⁸ Individual tower fences need not be installed if the towers are contained within a protective property fence.⁹ Station KLRG-AM’s antenna structure has radio frequency potential at the base.¹⁰ On January 24 and 25, 2012, agents from the New Orleans Office observed that over half of the fence surrounding the Station’s antenna structure was lying on the ground, while Station KLRG-AM was in operation. Thus, the fence did not effectively enclose the base of the structure. The agents also did not observe a perimeter fence surrounding the property. Therefore, based on the evidence before us, we find that Wagenvoort apparently willfully and repeatedly violated Section 73.49 of the Rules by failing to have an effective locked fence or other enclosure around the base of its antenna structure.

² 47 U.S.C. § 503(b).

³ 47 U.S.C. § 312(f)(1).

⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

⁵ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁸ 47 C.F.R. § 73.49.

⁹ *Id.*

¹⁰ See License File No. BR-20120118AAE.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to maintain AM transmission system fencing requirements is \$7,000.¹¹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹² Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Wagenvoord is apparently liable for a forfeiture in the amount of \$7,000.

7. We direct Wagenvoord to submit a written statement, pursuant to Section 1.16 of the Rules,¹³ in addition to any statement it might submit pursuant to paragraph 9, signed under penalty of perjury by an officer or director of Wagenvoord, stating that the Station's antenna structure complies with the Commission's fencing rules and is enclosed by an effective locked fence or other enclosure. This statement must be provided to the New Orleans Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Wagenvoord Advertising Group, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seven thousand dollars (\$7,000) for violation of Section 73.49 of the Rules.¹⁴

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Wagenvoord Advertising Group, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Wagenvoord Advertising Group, Inc. **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, New Orleans Office, 2424 Edenborn Avenue, Suite 460, Metairie, LA 70001. Wagenvoord Advertising Group, Inc. shall also e-mail the written statement to SCR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Wagenvoord Advertising Group, Inc. will also send electronic notification on the date said payment is made to **SCR-**

¹¹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹² 47 U.S.C. § 503(b)(2)(E).

¹³ 47 C.F.R. § 1.16.

¹⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.49.

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Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.¹⁷ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, New Orleans Office, 2424 Edenborn Avenue, Suite 460, Metairie, LA 70001, and include the NAL/Acct. No. referenced in the caption. Wagenvoort Advertising Group, Inc. also shall email the written response to SCR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁶ See 47 C.F.R. § 1.1914.

¹⁷ 47 C.F.R. §§ 1.16, 1.80(f)(3).

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Wagenvoord Advertising Group, Inc. at 2360 NE Coachman Rd., Clearwater, FL 33765.

FEDERAL COMMUNICATIONS COMMISSION

Walter Gernon
District Director
New Orleans Office
South Central Region
Enforcement Bureau



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 12-1153
Released: July 18, 2012

**PUBLIC SAFETY AND HOMELAND SECURITY BUREAU SEEKS COMMENT ON 9-1-1
RESILIENCY AND RELIABILITY IN WAKE OF JUNE 29, 2012, DERECHO STORM IN
CENTRAL, MID-ATLANTIC, AND NORTHEASTERN UNITED STATES**

PS Docket No. 11-60

Comments Due: August 17, 2012
Reply Comments Due: September 4, 2012

Introduction

On June 29, 2012, a fast-moving weather storm called a derecho brought a wave of destruction across wide swaths of the United States, beginning in the Midwest and continuing through the mid-Atlantic and Northeastern regions of the country. Millions of Americans lost electrical power during the storm for periods ranging from a few hours to over a week in the middle of a heat wave, and the storm caused billions of dollars in physical damage. The storm had a significant adverse effect on communications services generally and 9-1-1 facilities particularly.¹ From isolated breakdowns in Ohio, Kentucky, Indiana, and Pennsylvania, to systemic failures in northern Virginia and West Virginia, it appears that a significant number of 9-1-1 systems and services were partially or completely down for several days.

The impact of the storm in northern Virginia was particularly severe, notably in Fairfax County, parts of Prince William County, Manassas Park and Manassas, where over 1 million people faced the possibility of not being able to call 9-1-1 successfully.² In those jurisdictions, media reports and local government officials indicate that public safety answering points (PSAPs), which process calls to 9-1-1 facilities, failed, as did backup systems. Multiple access technologies appear to have been affected by the outages, including traditional networks, broadband networks, and wireless networks.

The Public Safety and Homeland Security Bureau (PSHSB or Bureau) of the Federal Communications Commission (FCC or Commission) responded immediately, closely coordinating with the Federal Emergency Management Agency (FEMA) and constantly communicating with service providers and other stakeholders from the time the storm hit and throughout the period impacts were felt by the public. At noon on Saturday, June 30, the Commission granted an emergency special temporary authorization allowing a Missouri power company crew to use certain frequencies to assist in the restoration of electric power within the Ohio disaster area.

¹ See, e.g., Sullivan, Pat, *911 Failure Affected 2.3 Million in Northern Virginia*, WASH. POST, Jul. 11, 2012.

² See, e.g., Sullivan, Pat, *After Storm, 9-1-1, Phone Service Remains Spotty*, WASH. POST, Jul. 2, 2012.

Utilizing the Commission's Operations Center, which is staffed 24 hours a day/7 days a week, and supplementing it with direct outreach and pre-established reporting protocols, the Commission obtained important information on communications outages related to 9-1-1 centers, broadcast stations, and public safety communications systems that it shared with its Federal partners (*e.g.*, FEMA). Vital information on outages also came through the Commission's mandatory Network Outage Reporting System (NORS) and voluntary Disaster Information Reporting System (DIRS). At 5:15 p.m. on Saturday, June 30, the Commission activated DIRS, targeting selected providers with systems in the disaster area, in this case the District of Columbia and certain counties in Maryland, Virginia, and West Virginia. Through DIRS, the Commission received regular updates on the status of wireline, wireless, and 9-1-1 communications outages and restoration efforts. As company maintenance crews largely restored communications services in certain areas, the Commission de-activated DIRS for those areas on July 3, 2012 and completely deactivated it on July 4, 2012. The Commission also issued on its website and distributed through social media a consumer tip sheet for the public about communicating after the derecho, while the effects of the storm were still being felt.

Immediately after communications and 9-1-1 services were restored, the Bureau began an inquiry focused on learning all of the facts and circumstances of the various outages, including the causes and, importantly, ways to make the public safer and avoid future outages. The Bureau began an ongoing series of meetings with stakeholders, such as communications service providers, public safety officials, and others, and continues to seek and obtain relevant information. The Bureau is assessing and evaluating the storm-related information received through NORS or DIRS, and still coming in through NORS. The Bureau is also coordinating with state and local governments, which are responsible for establishing and operating 9-1-1 facilities, providing first responder services, and regulating certain relevant communications services.

By this Public Notice, the Commission and the Bureau further expand the ongoing inquiry. The Public Notice broadens the inquiry in two ways, by expanding those who may contribute relevant information to include the public, and focusing not only on issues directly surrounding the derecho and what happened during and after it, but also on other experiences associated with natural disasters throughout the nation that involve outages or are otherwise related to the resiliency and reliability of communications services and networks of all kinds that are used to seek, process or obtain emergency assistance. Especially in the face of events that lead more people than usual to need emergency help, they must be able to connect to get it. It is vital to seek focused comments broadly on what happened during and after this or other storms, and what can be done to better address these issues going forward.

Congress has given the Commission a particular responsibility under the Communications Act to ensure communications networks of all types "promot[e] safety of life and property."³ Central to this important responsibility is ensuring the reliability, resiliency and availability of communications networks in times of emergency, including and especially during and immediately after a natural disaster such as a derecho. Recognizing this, last year the Commission initiated a proceeding on the reliability and

³ See 47 U.S.C. § 151; *see also* 47 U.S.C. § 154 (a) ("For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.") In addition, the Commission recently strengthened its outage reporting requirements by extending them to interconnected VoIP services. *See* In the Matter of the Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, PS Docket No. 11-82, 27 FCC Rcd 2650 (2012).

continuity of communications networks, including broadband technologies.⁴ Information received in connection with this Public Notice will add important information that will inform the Commission's action in this proceeding.

Request for Comment

The Bureau seeks comment on the background, causes, and restoration efforts related to communications services and facilities impacted directly or indirectly by the storm and after. It seeks to develop a complete and accurate record of all the facts surrounding the outages during this storm as well as outages resulting from natural disasters in order to evaluate the overall resiliency and reliability of our Nation's 9-1-1 systems and services. We also seek comment on the impact these outages had on the various segments of the public, including consumers, hospitals, and public safety entities.

The Bureau's review is also intended to further develop the record in the Commission's ongoing examination of issues in the April 2011 notice of inquiry (NOI) on the resiliency, reliability and continuity abilities of communications network, including broadband technologies,⁵ and comments received in response to this Public Notice will become part of the record of the NOI. In that proceeding, the Commission initiated a comprehensive examination of these issues with the goal of determining what action, if any, the Commission should take to ensure that our Nation's communications infrastructure is as reliable as possible and able to continue to function in times of emergency. In its NOI, the Commission also focused on 9-1-1 reliability and stated that "[p]eople dialing 9-1-1, whether using legacy or broadband-based networks, must be able to reach emergency personnel for assistance; and when networks dedicated to public safety become unavailable, first responders must have access to commercial communications, including broadband technologies, to coordinate their rescue and recovery efforts."⁶

Questions Regarding Derecho Impact, Effects, and Restoration Efforts

Below, the Bureau poses a series of questions related to the impact of the storm on emergency and 9-1-1 communications accessed by traditional communications networks, broadband communications networks, and wireless communications networks. The Bureau also requests comment on the storm's impact on various user groups. PSHSB seeks comment on the following issues:

Causes of Outages. What were the specific causes of the outages that occurred during or after the storms? Which network elements and components, such as Public Switched Telephone Network (PSTN) trunks, Internet-Protocol (IP) broadband access lines, databases and PSTN switches, were out of service and for how long? For example, to what extent were issues like powering, physical damage, and power surges contributing factors to the outages? To what extent are there industry best practices that address these, and any other, contributing causes? To what extent were they followed?

In what ways was physical damage due to the storm a major cause of outages? What could be done to improve the resiliency of communications infrastructure in the face of physical damage like what was seen during the storm? Are there actions the communications industry can take to avoid or mitigate

⁴ See *In the Matter of Reliability and Continuity of Communications Networks, Including Broadband Technologies, et al., Notice of Inquiry*, PS Docket No. 11-60, *et al.*, 26 FCC Rcd 5614 (2011) ("*Reliability NOI*").

⁵ See generally, *Reliability NOI*.

⁶ See *Reliability NOI*, 26 FCC Rcd at 5616 ¶ 5.

these outages in future similar events? Should the FCC take other steps to improve communications resiliency during strong storms like this?

In what ways was the derecho an “extraordinary” event? For example, compared to other types of disasters, did it occur with unusually short notice, affect an unusually large area, and was it unusually intense? How did these factors inhibit service providers in responding to the event and restoring service? How did these factors affect consumers’ need for communications services and ability to obtain emergency services? What could be done to better prepare for events like this in the future? Specifically, what actions should communications service providers and PSAPs take to better prepare for similar events in the future?

How did service providers become aware that 9-1-1 outages had occurred? What types of monitoring systems were in place for various types of assets, both in the field and inside buildings? How well did these monitoring systems perform during the storm?

What role did the availability or absence of back-up power for network equipment play in the 9-1-1 outages that occurred during the storm? What could be done to improve the ability of communications assets to operate longer when commercial power is lost? Are there new technologies, such as solar and fuel cells, which provide promise in this area? What maintenance practices are in place to compensate for the loss of commercial power? How did these methods perform during the storm? Are there actions the FCC should take to improve the ability of communications networks to survive commercial power outages? What types of measures could be taken to improve the robustness of communications infrastructure in response to failures of commercial power? Should the Commission consider taking action, either voluntary or mandatory, that would address back-up power?

What forms of network interconnection, both PSTN and IP, were affected by the storm or loss of power? How and why were they affected? Did these disruptions affect communications seeking 911 or other emergency assistance and how? What carrier and public safety facilities have multiple means or forms of interconnection and which do not? Which of these facilities are essential for 911 communications? What monitoring of interconnection was in place and how did it perform? To what extent are there industry best practices addressing forms of interconnection and diversity and redundancy? To what extent were they followed?

Effect on 9-1-1 Systems and Services. What could be done to improve the reliability of the 9-1-1 network when faced with storms like the derecho or other threats? Are there actions the FCC should take to improve the reliability of 9-1-1 services during strong storms like this? What actions should communications service providers take? Are there actions that communications service providers and/or PSAPs should take to improve the 9-1-1-restoration process? What, if anything, can the FCC do to better assist communications service providers and PSAPs in the restoration process?

How was 9-1-1 call completion affected by outages caused by the storm? Is there an estimate of how many 911 calls could not be completed at all or only through alternate means, such as ten-digit numbers? To what extent do industry best practices exist that relate to these events, and were these best practices followed? Were there instances where PSAPs went offline due to failures on their own premises? To what extent did the storm affect Automatic Number Identification (ANI) and Automatic Location Identification (ALI)? What were the primary causes of failures to ANI and ALI services? To what extent were vital 9-1-1 facilities and network elements deployed redundantly by service providers? For example, were selective routers routinely deployed in a diverse manner? Likewise, were facilities

that carry ALI and ANI information routed in a diverse manner? What should be done to improve the diverse provisioning of 9-1-1 facilities and elements?⁷

Effect of 9-1-1 Outages. What impact did the 9-1-1 outages have on the public? For example, how were consumers affected? How did the outages affect the ability of public safety officials to perform their duties? How was the public alerted of the 9-1-1 outages and what alternatives were provided? How effective were these alternatives? To what extent was social media used to spread the word about the 9-1-1 outages and alternatives? What impact did the 9-1-1 outages have on other sectors of the user community, including businesses and providers of critical services, such as hospitals?

Effect of Communications Outages on Access to 9-1-1 Services. Outages in the 9-1-1 network itself are only one way that users can be denied access to 9-1-1 services. For example, if the PSAP is operational and the 9-1-1 network is functioning, users in a local area will still be unable to reach the PSAP if they lack access to the communications network due to a local outage. To what extent did users find that the general unavailability of communications service impaired their ability to access 9-1-1 service? In these instances, were multiple methods of reaching the PSAP available, like cell phones or other types of communications services? How effective were these alternative communications services in overcoming outages affecting one access platform? What should be done to improve the diversity of access to 9-1-1 services so that communications outages are less likely to result in an inability to access 9-1-1?

Questions Regarding 9-1-1 Resiliency and Reliability Generally

The 9-1-1 communications failures experienced as a result of the derecho also give rise to concerns and questions about the reliability and resiliency of our 9-1-1 communications networks nationwide, particularly in the event of a severe weather or other type of high-impact natural disaster. We seek comment on how 9-1-1 communications has fared during other recent natural disaster events. Please describe any lessons learned from those events, in particular improvements that were recommended to improve 9-1-1 service reliability and survivability. Commenters should address the impact on communications relying on the PSTN- and IP-based communications, as well as fixed and mobile wireless communications.

We also seek comment on the most common causes of failure in the 9-1-1 network that result in the following types of 9-1-1 outages: i) complete isolation of the PSAP; ii) failure to pass ALI and/or ANI; iii) loss of the ability to re-route traffic to an alternate PSAP or administrative lines. What could be done to reduce the incidence of outages in each category? What actions, if any, should the FCC take to address this problem?

In what ways does the practice of deploying redundant facilities or systems used in the 9-1-1 network promote 9-1-1 reliability? How does the service provider ensure that these practices are followed routinely and remain in place over time, even as changes are made to the networks? What, if anything, should the FCC do to promote the application of such methods?

How do service providers routinely monitor 9-1-1 facilities and the availability of 9-1-1 service? How quickly do service providers become aware of 9-1-1 failures of various kinds? Do service providers

⁷ *Public Notice*, FCC's Public Safety and Homeland Security Bureau Reminds Telecommunications Service Providers of the Importance of Implementing Established 9-1-1 and Enhanced 9-1-1 Best Practices, DA 12-891, rel. June 6, 2012.

routinely notify PSAPs of 9-1-1 outages? How are they alerted, under what conditions, and how quickly? What steps does the service provider take routinely to prioritize restoration of 9-1-1 service? What standard operating procedures and systems does the service provider have in place to facilitate the detection and restoration of 9-1-1 service after an outage? Are these resources adequate?

PSAPs are typically small operations playing a large role in protecting the safety of the public. The failure of a few trunks into a PSAP could affect public safety for an entire community, but the failure of just a few trunks might not attract much attention from a service provider. Do provider alarm systems provide adequate visibility to relatively small outages that can have a large impact on PSAPs, especially when demand may spike, such as during or after a major storm? Do providers provide appropriate urgency to handling such outages?

To what extent is the availability of multiple access platforms (*e.g.*, residential telephone line, whether legacy or IP-based, cell phone, *etc.*) to reach networks services creating greater richness of diversity that would tend to improve 9-1-1 reliability? Stated differently, to what extent does the public have more than one way to reach 9-1-1 that are not reliant on each other? To what extent are available access platforms reliant on each other or another common point of failure?

The legacy communications network uses a hierarchical architecture, whereby failures of network elements located deeper in the network will result in a larger number of customers being denied network service. For this reason, elements deeper in the network (*e.g.*, switches) were often designed to very high reliability specifications. To what extent has the legacy infrastructure retained this characteristic? Today's networks are quickly migrating to broadband IP technology. To what extent does the migration to IP-based networks reduce or increase the level of concentration deeper in the network? What is the resultant impact on communications reliability?

What other steps might service providers take? What actions should PSAPs take? What other actions, if any, should the Commission take to encourage those steps? What actions should the public and other institutions like hospitals take, if any? We seek comment on whether the deployment of Next Generation (NG911) will improve the reliability of 9-1-1 services and, if so, how? Would NG911 make it easier to have more than one backup PSAP and provide additional redundancy of transmission facilities, *e.g.*, via satellite or microwave point-to-point links? Did commercial data centers in the affected areas experience outages and for how long? Would it increase reliability if critical components of the NG911 system are housed or replicated in commercial data centers?

NG911 will create the ability to utilize a "virtual PSAP." Today's 9-1-1 system generally requires a call taker to answer a 9-1-1 call from within the walls of a single physical ("brick and mortar") PSAP. In a NG911 network, however, a call taker will be able to answer a 9-1-1 call from virtually any location. We seek comment on the potential for development of virtual PSAPs. Are current technologies sufficient to support virtual PSAPs? Are there specific steps that service providers should take to ensure that they have adequate reliability when implementing NG9-1-1? How would the addition of a 9-1-1 text capability provide substantial improvement in the ability of consumers to contact PSAPs?

Procedural Matters

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

Parties wishing to file materials with a claim of confidentiality should follow the procedures set forth in section 0.459 of the Commission's rules. Casual claims of confidentiality are not accepted. Confidential submissions may not be filed via ECFS but rather should be filed with the Secretary's Office following the procedures set forth in 47 C.F.R. § 0.459. Redacted versions of confidential submissions may be filed via ECFS. Parties are advised that the Commission looks with disfavor on claims of confidentiality for entire documents. When a claim of confidentiality is made, a public, redacted version of the document should also be filed.

The proceeding of which this Notice is a part is a "permit-but-disclose" proceeding conducted in accordance with the Commission's *ex parte* rules.⁸ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing

⁸ 47 C.F.R. §§ 1.1200 *et seq.*; see also *Reliability NOI*, 26 FCC Rcd at 5630-31 ¶ 53.

oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information regarding this proceeding, contact Michael Connelly, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau at (202) 418-0132 or michael.connelly@fcc.gov. News media contact: Lauren Kravetz, Public Safety and Homeland Security Bureau at (202) 418-7944 or lauren.kravetz@fcc.gov.

The Public Safety and Homeland Security Bureau issues this Public Notice under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

- FCC -

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DA 12-1154
July 19, 2012

FIRST MEETING OF THE 2015 WORLD RADIOCOMMUNICATION CONFERENCE ADVISORY COMMITTEE

IB Docket No. 04-286

The first meeting of the Advisory Committee for the 2015 World Radiocommunication Conference (WRC-15 Advisory Committee) will be held on August 9, 2012; at 9:00 a.m. in the Commission Meeting Room (TW-C305), 445 12th Street, S.W., Washington, D.C. A draft agenda of the meeting is attached.

The WRC-15 Advisory Committee's objective is to provide the FCC with advice, technical support and recommended proposals for the WRC-15. At its initial meeting, the WRC-15 Advisory Committee will consider formation of its Informal Working Groups (IWGs), assignment of WRC-15 agenda items to the IWGs, scheduling and other organizational matters. This meeting is open to the public.

Additional information on WRC-15 and Advisory Committee matters is available at the Commission's newly established WRC-15 web site <http://www.fcc.gov/wrc-15>. Comments may be presented at the WRC-15 Advisory Committee meeting or by email to: WRC-15@fcc.gov.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to fcc504@fcc.gov or by calling the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice; last minute requests will be accepted, but may not be possible to accommodate.

For additional information please contact Alexander Roytblat, the Designated Federal Official for the WRC-15 Advisory Committee, at (202) 418-7501 or Donna Christianson, Secretariat for the WRC-15 Advisory Committee, at (202) 418-7326.

AGENDA

**First meeting of the WRC-15 Advisory Committee
Federal Communications Commission
445 12th Street, S.W., Room TW-C305
Washington, D.C. 20554**

August 9, 2012; 9:00 a.m.

1. Opening Remarks
2. Approval of Agenda
3. Advisory Committee Structure
4. WRC-15 Preparatory Process Timeline
5. Other Business

- FCC -

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matters of)	
)	
Connect America Fund	)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
)	
Developing a Unified Inter-carrier Compensation Regime	)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
)	
Lifeline and Link-Up	)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

ORDER

Adopted: July 18, 2012

Released: July 18, 2012

By the Acting Chief, Wireline Competition Bureau

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) clarifies certain rules relating to Phase I of the Connect America Fund (CAF) in order to assist the price cap carriers that shortly will be making their election to accept additional funding to spur broadband deployment.¹ Commission staff have received informal inquiries from price cap companies on certain implementation aspects of the rules governing CAF Phase I. We also make a correction to one of the Commission's rules to fix a clerical error relating to the support for carriers serving remote areas of Alaska.

¹ In the *USF/ICC Transformation Order*, the Commission delegated to the Bureau the authority to revise and clarify rules as necessary to ensure that the reforms adopted in the *Order* are properly reflected in the rules. See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663, 18149, para. 1404 (2011) (*USF/ICC Transformation Order or Order*), *pts. for review pending sub nom. In re: FCC*, No. 11-9900 (10th Cir. filed Dec. 18, 2011); 47 C.F.R. §§ 0.91, 0.201(d), 0.291. See also *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 12-147 (rel. Feb. 3, 2012); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 12-298 (rel. Feb. 27, 2012).

II. BACKGROUND

2. In the *USF/ICC Transformation Order*, the Commission adopted a framework for the Connect America Fund to provide support in the territories of price cap carriers and their rate-of-return affiliates based on a combination of competitive bidding and a forward-looking cost model. The Commission observed that developing a new cost model and bidding mechanism could be expected to take some time. To spur broadband deployment even as those mechanisms are being developed, the Commission established Phase I of the CAF, a transition mechanism from the old high-cost support mechanisms for price cap carriers to the new CAF. In Phase I, the Commission froze current high-cost support for price cap carriers and their affiliates, and, in addition, committed up to \$300 million in incremental support to promote broadband deployment.² The \$300 million in incremental support was allocated among price cap carriers using a formula to estimate wire center costs that was based on the prior high-cost proxy model.³

3. Participation in the CAF Phase I incremental support program is optional. But carriers that accept funding are required to deploy broadband to a number of locations, currently unserved by fixed broadband, equal to the amount of incremental support the carrier accepts divided by \$775.⁴ Each carrier accepting funding must identify the areas, by wire center and census block, in which it intends to deploy broadband to meet its obligation, when it files its notice of acceptance.⁵ Carriers are required to complete deployment to no fewer than two-thirds of the required number of locations within two years and all required locations within three years, and they must certify that they have done so as part of their annual certifications under section 54.313 of the Commission's rules.⁶ The Commission also provided that "[c]arriers failing to meet a deployment milestone will be required to return the incremental support distributed in connection with that deployment obligation and will be potentially subject to other penalties, including additional forfeitures, as the Commission deems appropriate."⁷ However, the Commission continued, "[i]f a carrier fails to meet the two-thirds deployment milestone within two years and returns the incremental support provided, and then meets its full deployment obligation associated with that support by the third year, it will be eligible to have support it returned restored to it."⁸

III. DISCUSSION

4. First, we clarify how to calculate the amount of support a carrier must return for failing to meet its deployment requirements. Specifically, if a carrier fails to meet its deployment obligations, it will be required to return to the Commission an amount equal to \$775 multiplied by the number of locations to which the carrier was required to deploy to but did not, but a carrier will not be required to "pay twice" for any failure to meet a requirement. For example, if a carrier accepted \$6,975,000 and committed to deploying to 9,000 locations over three years, but only deployed to 5,800 by the end of two years, rather than the 6,000 required at that milestone, the carrier would be required to return \$155,000 of its incremental support (200 locations times \$775). Similarly, a carrier that accepted the same amount and deployed to all 6,000 locations by the second year but deployed to only 8,900 by the end of the third year would be required to return \$77,500 (100 locations times \$775). However, if the same carrier

² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17715, para. 133.

³ See *id.* See also *Wireline Competition Bureau Announces Support Amounts for Connect America Fund Phase One Incremental Support*, WC Docket Nos. 10-90, 05-337, DA 12-639 (rel. Apr. 25, 2012).

⁴ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17715, para. 133.

⁵ See *id.* at 17720, para. 146; 47 C.F.R. §§ 54.312(b)(3), 54.313(b).

⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17721, para. 147; 47 C.F.R. § 54.312(b)(4).

⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17721, para. 147.

⁸ *Id.* at 17721-22, para. 147.

deployed to 5,800 of its required 6,000 locations by the second year, returned the \$155,000 required, and then continued its deployment, reaching 8,900 by the end of the third year, it would have \$77,500 of its returned support restored. We note that this discussion does not address any additional penalties that the Commission may choose to impose on any carrier that fails to meet its deployment obligation, as stated in the *Order*.⁹

5. Second, we clarify that when a carrier files its notice of acceptance of funding, identifying the wire centers and census blocks in which it intends to deploy, it is not binding itself to deploy only in those areas, nor is it committing to deploy to every unserved location in those areas. We clarify that carriers are expected to make a good faith effort to identify where they will deploy when they file their notices of acceptance. We observe, in this regard, that there are a number of practical obstacles that may make it difficult for carriers to commit irrevocably to a particular deployment plan by July 24th. For example, carriers may not have perfect information now about the number of locations in every potential area, the number of locations in an area may change over time, and the aggressive schedule for identifying intended buildout locations may make it difficult for carriers to gain complete information about potential deployments prior to filing their notices of acceptance. Accordingly, we clarify that carriers may, in satisfaction of their deployment requirement, deploy to eligible locations not identified in their notices of acceptance, but will be required to identify subsequently where deployment actually occurred. Similarly, if a carrier finds that deploying to an area it intended to deploy to would be impractical, it will not be subject to penalties on account of its failure to deploy broadband to that particular area.

6. Third, we clarify that the certification associated with carriers' two- and three-year deployment milestones, which carriers must include as part of their annual filings under section 54.313(b) of the Commission's rules,¹⁰ must specify the number of locations in a census block-wire center combination to which they have actually built. Carriers must identify the precise number of locations so that appropriate adjustments, if any, can be made to support previously provided, if a carrier fails to meet its deployment obligation. To facilitate the ability of USAC and the Commission to validate that carriers have, in fact, met their deployment obligations, carriers must be prepared, upon request, to provide sufficient information regarding the location of actual deployment to confirm the availability of service at that location.

7. Fourth, we clarify that the certifications each carrier makes when it accepts incremental support—that the locations to be deployed to are shown on the National Broadband Map as unserved by fixed broadband by any provider other than the certifying entity itself or an affiliate; that, to the best of the carrier's knowledge, the locations are, in fact, unserved by fixed broadband; that the carrier's capital improvement plan did not already include plans to complete broadband deployment within the next three years to the locations to be counted to satisfy the deployment obligation; and that incremental support will not be used to satisfy any merger commitment or similar regulatory obligation¹¹—are certifications that apply to all locations that in fact the carrier extends broadband to, using CAF Phase I incremental support. That is, if a carrier finds it necessary to deploy to locations other than the locations identified in its initial acceptance filing, those other locations may not be in areas, for example, that were shown on the National Broadband Map, at the time of acceptance, as served.

8. Fifth, we clarify that when a carrier certifies that the locations to which it will deploy are shown as unserved by fixed broadband on the "current" version of the National Broadband Map, the "current" version of the National Broadband Map is the version that was publicly available on the

⁹ See *id.* at 17720, para. 147.

¹⁰ See 47 C.F.R. § 54.313(b).

¹¹ See 47 C.F.R. § 54.312(b)(3).

National Broadband Map website on the date eligible support amounts were announced.¹² The Commission intended for carriers to have 90 days to determine how much incremental support they would accept and which wire centers and census blocks they would deploy to in order to meet their CAF Phase I commitments.¹³ To the extent the National Broadband Map data is updated during the 90-day period in which carriers are evaluating how much incremental support they will accept, that could leave carriers with less time to evaluate the updated version of the map. Potentially altering CAF Phase I incremental support deployment plans before the deadline for them to accept funding would be unreasonable and contrary to the Commission's framework for CAF Phase I funding, and we clarify the requirement to ensure that carriers have a full 90 days to make their CAF I plans.

9. Sixth, we further clarify that the term "fixed broadband" for the purposes of CAF Phase I includes any technology identified on the then-current version of the National Broadband map that is not identified as a mobile technology or a satellite-based technology. In this regard, we observe that the technologies reported on the National Broadband Map at the time the *Order* was issued varied from the technologies listed on the Broadband Map currently.¹⁴ The Commission in the *Order* distinguished fixed terrestrial broadband technologies from mobile and satellite broadband technologies, determining that only fixed terrestrial broadband technologies are relevant to the determination of whether an area is served for the purposes of CAF Phase I; the clarification we provide here reflects this distinction.¹⁵

10. Finally, we correct section 54.307(e)(5) of the Commission's rules.¹⁶ Paragraph 180 of the first erratum to the *USF/ICC Transformation Order* corrected section 54.307(e)(5) to replace "described in paragraph (e)(2)(iv) of this section" with "described in paragraph (e)(2)(iii) of this section." The text to be replaced appeared twice in section 54.307(e)(5), but, through a clerical error, only the second instance of that text in the rule was corrected. We now correct the rule to replace the remaining instance of that text.

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act

11. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

¹² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17720-21, para. 146. See also 47 C.F.R. § 54.312(b)(3) (requiring a carrier accepting CAF Phase I incremental support to certify that locations the carrier intends to deploy to are shown as unserved by fixed broadband on the "then-current" version of the National Broadband Map).

¹³ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17720-21, para. 146 (within 90 days of being informed of the amount of incremental support it is eligible to receive, each carrier must provide notice . . . identifying the amount of support it wishes to accept and the areas by wire center and census block in which the carrier intends to deploy broadband). See also 47 C.F.R. § 54.312(b)(3).

¹⁴ Compare *USF/ICC Transformation Order*, 26 FCC Rcd at 17720-21 n.231 with National Broadband Map: Type of Technology Available, available at <http://www.broadbandmap.gov/technology>. We note that the current National Broadband Map does not report satellite coverage.

¹⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17720-21 n.231.

¹⁶ See 47 C.F.R. § 54.307(e)(5).

B. Final Regulatory Flexibility Act Certification

12. The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁷ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”¹⁸ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²¹

13. This Order clarifies, but does not otherwise modify, the *USF/ICC Transformation Order*. These clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to *USF/ICC Transformation Order*. Therefore, we certify that the requirements of this Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order including a copy of this final certification in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.²² In addition, the Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.²³

C. Congressional Review Act

14. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.²⁴

¹⁷ The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁸ 5 U.S.C. § 605(b).

¹⁹ 5 U.S.C. § 601(6).

²⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²¹ Small Business Act, 15 U.S.C. § 632.

²² *See* 5 U.S.C. § 801(a)(1)(A).

²³ *See* 5 U.S.C. § 605(b).

²⁴ *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and pursuant to sections 0.91, 0.201(d), 0.291, 1.3, and 1.427 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.201(d), 0.291, 1.3, 1.427 and pursuant to the delegation of authority in paragraph 1404 of FCC 11-161 (rel. Nov. 18, 2011), that this Order IS ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau

**APPENDIX
Final Rules**

For the reasons discussed in the Order, the Federal Communications Commission amends 47 CFR part 54 to read as follows:

PART 54—UNIVERSAL SERVICE

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

2. Amend § 54.307(e)(5) to read as follows:

* * * * *

(5) Implementation of Mobility Fund Phase II Required. In the event that the implementation of Mobility Fund Phase II has not occurred by June 30, 2014, competitive eligible telecommunications carriers will continue to receive support at the level described in paragraph (e)(2)(iii) of this section until Mobility Fund Phase II is implemented. In the event that Mobility Fund Phase II for Tribal lands is not implemented by June 30, 2014, competitive eligible telecommunications carriers serving Tribal lands shall continue to receive support at the level described in paragraph (e)(2)(iii) of this section until Mobility Fund Phase II for Tribal lands is implemented, except that competitive eligible telecommunications carriers serving remote areas in Alaska and subject to paragraph (e)(3) of this section shall continue to receive support at the level described in paragraph (e)(3)(v) of this section.

* * * * *

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
	)	WCB/Pricing File No. 12-09
National Exchange Carrier Association)	
Revisions to Tariff F.C.C. No. 5	)	Transmittal No. 1350
)	
)	

ORDER

Adopted: July 19, 2012

Released: July 19, 2012

By the Acting Chief, Pricing Policy Division, Wireline Competition Bureau:

1. On July 12, 2012, the National Exchange Carrier Association (NECA) filed Transmittal No. 1350 to revise Tariff F.C.C. No. 5, Access Services, to become effective July 20, 2012. NECA proposes to reduce Access Recovery Charge (ARC) rates for the following companies: Barry County Telephone Company, Big Sandy Telecom, Inc., Columbine Acquisition Corp. d/b/a Columbine Telecom Company, GTA Telecom, LLC, GTC, Inc., and James Valley Cooperative Telephone Company.

2. Transmittal No. 1350 proposes to modify ARC rates that are already subject to the investigation of NECA's Tariff F.C.C. No. 5.¹ Because these revised ARC rates raise the same substantial questions of lawfulness described in the *2012 Annual Access Charge Tariff Order*, they warrant further investigation. Accordingly, Transmittal No. 1350 is suspended for one day and will be subject to the investigation initiated in the *2012 Annual Access Charge Tariff Order*. Transmittal No. 1350 also will be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the revisions to NECA's Tariff F.C.C. No. 5 ARE SUSPENDED for one day from the July 20, 2012 effective date, and investigations of the referenced transmittals are instituted and incorporated within WCB/Pricing File No. 12-09.

4. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 204(a), NECA SHALL KEEP accurate account of all amounts received by the reason of the rates that are subject of this investigation.

¹ See July 3, 2012 *Annual Access Charge Tariff Filings*, WCB/Pricing File No. 12-09, Order, DA 12-1037, at para. 5 (Wireline Comp. Bur., rel. July 2, 2012) (*2012 Annual Access Charge Tariff Order*).

THE OHIO STATE UNIVERSITY
MONTZ LYN LIPSON

5. IT IS FURTHER ORDERED that NECA SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

FEDERAL COMMUNICATIONS COMMISSION

Victoria S. Goldberg
Acting Chief, Pricing Policy Division
Wireline Competition Bureau



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
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DA 12-1157
Release Date: July 19, 2012

**WIRELINE COMPETITION BUREAU SEEKS COMMENT ON
ACS WIRELESS, INC. PETITION FOR WAIVER OF A
HIGH-COST UNIVERSAL SERVICE FILING DEADLINE**

WC Docket No. 10-90

Comment Date: August 2, 2012
Reply Comment Date: August 9, 2012

The Wireline Competition Bureau seeks comment on a petition filed by ACS Wireless, Inc. (ACS Wireless) for a waiver of section 54.313(j) of the Commission's rules, which requires an eligible telecommunications carrier to file an annual report with the Commission, the Universal Service Administrative Company, and the relevant state commissions, relevant authority in a U.S. Territory, or Tribal governments, as appropriate.¹ In 2012, that annual report was due on July 2.²

Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before the dates indicated above.³ Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).⁴

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

¹ ACS Wireless, Inc. Petition for Waiver of Section 54.313(j) of the Commission's Rules, WC Docket No. 10-90 (filed July 16, 2012); 47 C.F.R. § 54.313(i).

² *Wireline Competition Bureau Announces Filing Deadline of July 2, 2012, for Eligible Telecommunications Carriers to File Reports Pursuant to Section 54.313(a)(2) Through (a)(6) and (h) of the Commission's Rules*. WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92 and 96-45; WT Docket No. 10-208, Public Notice, 27 FCC Rcd 5077 (2012). In subsequent years, the filings will be due on July 1. See 47 C.F.R. § 54.313(j).

³ 47 C.F.R. §§ 1.415, 1.419.

⁴ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

- (1) Abdel Eqab, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-B431, Washington, D.C. 20554; e-mail: Abdel-Hamid.Eqab@fcc.gov; and
- (2) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, D.C. 20554; e-mail: mailto:Charles.Tyler@fcc.gov.

The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.* .doc, .xml, .ppt,

⁵ 47 C.F.R. §§ 1.1200 *et seq.*

searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, please contact Abdel Eqab, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418-7400 or TTY (202) 418-0484.

- FCC -

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
MARITEL NORTHERN PACIFIC, INC.	)	FCC File Nos. 0003941632-33
MARITEL SOUTHERN PACIFIC, INC.)	
)	
Assignment of Authorization to PacifiCorp)	
)	
Request for Waiver of Part 80 of the)	
Commission's Rules)	

ORDER

Adopted: July 19, 2012

Released: July 20, 2012

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* On August 24, 2009, MariTEL Northern Pacific, Inc. and MariTEL Southern Pacific, Inc. (collectively, MariTEL) filed applications to partition and disaggregate portions of their licenses for VHF Public Coast (VPC) stations WPOJ532 and WPOJ536, respectively, to PacifiCorp (Applications).¹ To facilitate its proposed use of the spectrum, PacifiCorp requests a waiver of the Part 80 Rules.² We also have before us a petition to dismiss or deny the Applications (Petition).³ For reasons discussed below, we conclude that a waiver to permit PacifiCorp to use the assigned spectrum in support of its electric utility operations will serve the public interest in supporting critical infrastructure industry communications, will not preclude accommodation of maritime communications in the partitioned areas, and, as conditioned herein, will not pose a threat of harmful interference to maritime communications. Consequently, we grant the Waiver Request as set forth below, deny the Petition, and will process the Applications accordingly.

2. *Background.* In 2005, MariTEL filed applications to partition and disaggregate portions of these same two licenses to PacifiCorp, which requested waivers of the Part 80 Rules so that it could use the spectrum to support its electric utility operations.⁴ In 2006, the Public Safety and Critical Infrastructure Division (PSCID) of the Wireless Telecommunications Bureau (Bureau) granted

¹ FCC File Nos. 0003941632, 0003941633 (both filed Aug. 24, 2009) (Applications).

² See Request for Waiver of Part 80 of the Commission's Rules, attached to the Applications (Waiver Request).

³ See Petition to Dismiss or Deny, Or in the alternative Section 1.41 Request (filed Sept. 16, 2009 by Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC, Intelligent Transportation & Monitoring Wireless LLC, and Skybridge Spectrum Foundation (collectively, Petitioners)) (Petition). MariTEL and PacifiCorp each filed an opposition. See Opposition of MariTEL, Inc. (filed Sept. 28, 2009); Opposition of PacifiCorp (filed Sept. 30, 2009). The Petitioners filed a reply. See Reply to Oppositions to Petition to Dismiss or Deny, Or in the Alternative Section 1.41 Request (filed Oct. 13, 2009). In addition, Warren Havens, Environmental LLC, Verde Systems LLC, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus Holdings GB LLC and Skybridge Spectrum Foundation filed a Supplement – New Facts, And Request to Accept on May 27, 2010.

⁴ See FCC File Nos. 0001988156 (WPOJ532), 0001988415 (WPOJ536) (both filed June 13, 2005, amended Dec. 17, 2008 and Mar. 13, 2009).

PacifiCorp's waiver request only in part, in light of objections raised by the National Telecommunications and Information Administration (NTIA) on behalf of the United States Coast Guard (Coast Guard).⁵ Specifically, PSCID granted the request to permit operations only more than twenty miles from the Pacific Ocean and Columbia River.⁶ With respect to those areas, PSCID granted PacifiCorp's request for a waiver to permit private land mobile radio (PLMR) operations on VPC spectrum to be governed by Part 90 of the Commission's Rules only until resolution of the Commission's then-pending proceeding proposing to amend the Part 80 rules to permit PLMR use of VPC spectrum,⁷ but stated that PacifiCorp ultimately would be subject to the rules adopted in that proceeding.⁸

3. PacifiCorp timely sought Commission review of PSCID's decision not to grant the waiver in areas within twenty miles of the Pacific Ocean and Columbia River, but in 2008, MariTEL and PacifiCorp, after consulting with the Coast Guard, amended those applications (and the waiver request) to reduce the number of VPC channels on which PacifiCorp proposed to operate near major waterways.⁹ In 2009, the Bureau's Mobility Division¹⁰ granted PacifiCorp's amended waiver request and consented to the amended assignment applications.¹¹ Because the Commission had in 2007 amended the Part 80 rules to permit PLMR use of VPC spectrum¹² and PacifiCorp represented that its proposed operations otherwise complied with Part 80, the only rule waiver that PacifiCorp required was of the requirement in Section 80.123(b) of the Commission's Rules¹³ that priority be afforded to marine-originating communications.¹⁴

⁵ See PacifiCorp, *Order*, 21 FCC Rcd 7762 (WTB PSCID 2006) (2006 Waiver Order).

⁶ See *id.* at 7766 ¶ 9.

⁷ See MariTEL, Inc. and Mobex Network Services, LLC, *Notice of Proposed Rule Making*, WT Docket No. 04-257, 19 FCC Rcd 15225 (2004).

⁸ See 2006 Waiver Order, 21 FCC Rcd at 7766 ¶ 9. PacifiCorp was granted waivers of various Part 80 Rules, including Sections 80.105, 80.106, 80.123, 80.203, and 80.371, 47 C.F.R. §§ 80.105, 80.106, 80.123, 80.203, 80.371. See *id.* at 7763 n.3 (describing waiver request). 7767 ¶ 13 (conditionally granting waiver request except to the extent that PacifiCorp sought to operate on Channel 87B and surrounding interstitial channels, and to the extent it sought to operate within twenty miles of the Pacific coast or the Columbia River). The waived rules impose certain obligations on VPC licensees with respect to meeting maritime communications needs, establish power limits more stringent than those in Part 90, and require the use of equipment authorized under Part 80.

⁹ Because the Bureau had not yet formally consented to the assignment applications, they remained in pending status and thus could be amended.

¹⁰ Pursuant to a Commission reorganization effective September 25, 2006, certain duties of PSCID were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

¹¹ See PacifiCorp, *Order*, 24 FCC Rcd 5796 (WTB MD 2009) (2009 Waiver Order). The Mobility Division also granted PacifiCorp's request to withdraw its application for review. *Id.* at 5800 ¶ 11.

¹² See MariTEL, Inc. and Mobex Network Services, LLC, *Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971 (2007), *on recon.*, *Memorandum Opinion and Order*, 25 FCC Rcd 533 (2010), *aff'd*, *Order on Reconsideration*, 26 FCC Rcd 2491, *review dismissed*, *Second Memorandum Opinion and Order*, 26 FCC Rcd 16579 (2011).

¹³ See 47 C.F.R. § 80.123(b).

¹⁴ See 2009 Waiver Order, 22 FCC Rcd at 5798-800 ¶¶ 5-10. In 2010, the Commission confirmed that licensees operating pursuant to pre-2007 waivers that were conditioned on compliance with the rules eventually adopted in WT Docket No. 04-257 could not operate in conflict with those rules unless they obtained specific waivers of any rules with which they could not comply. See MariTEL, Inc. and Mobex Network Services, LLC, *Memorandum Opinion and Order*, WT Docket No. 04-257, 25 FCC Rcd 533, 537 ¶ 12 (2010), *aff'd*, *Order on Reconsideration*, 26 FCC Rcd 2491, *review dismissed*, *Second Memorandum Opinion and Order*, 26 FCC Rcd 16579 (2011).

4. Upon consummation of the assignment, PacifiCorp acquired the right to use certain VPC frequencies in those portions of the station WPOJ532 and WPOJ536 service areas that are within twenty miles from the Pacific Ocean and Columbia River, and the right to use those frequencies plus additional VPC frequencies in those portions of the service areas more than twenty miles from the Pacific Ocean and Columbia River; VHF maritime Channel 85 (157.275/161.875 MHz) was assigned only in areas more than twenty miles from the Pacific Ocean and Columbia River.¹⁵

5. Later in 2009, MariTEL filed the instant Applications for consent to assign Channel 85 to PacifiCorp in the station WPOJ532 and WPOJ536 service areas within twenty miles of the Pacific Ocean and Columbia River. PacifiCorp notes that most of the over-700,000 utility customers that it serves in Oregon, Washington, and California are in this area.¹⁶ It also represents that the eventual assignment of Channel 85 to PacifiCorp within twenty miles of the Pacific Ocean and the Columbia River “was specifically contemplated as part of the discussions among PacifiCorp, MariTEL, and the ... Coast Guard regarding the assignment of VPC frequencies to PacifiCorp,” as noted in PacifiCorp’s amended waiver request in 2008.¹⁷

6. *Discussion.* The Petition argues that the Applications should be dismissed, denied, or held in abeyance due to questions about the basic character qualifications of Donald DePriest and for other reasons unrelated to the assignment of VPC spectrum to PacifiCorp.¹⁸ In another matter involving MariTEL applications, we recently held that the issues raised by the Petition do not, under the Commission’s policies, constitute grounds to defer processing of MariTEL applications.¹⁹ Consequently, we deny the Petition.

7. With respect to the use of Channel 85 within twenty miles of the Pacific Ocean and the Columbia River, we grant PacifiCorp the same waiver relief it was accorded with respect to other VPC spectrum in 2009. We credit the parties’ representations that, after the assignment is consummated, MariTEL will retain sufficient spectrum to accommodate maritime communication needs in areas within twenty miles of the Pacific Ocean and the Columbia River.²⁰ We agree with PacifiCorp that the same public interest considerations that warranted grant of the earlier waiver requests support grant of this waiver request.²¹ We grant the waiver of the requirement in Section 80.123(b) that priority be afforded to marine-originating communications on the same conditions as in 2009: (1) that no interference be caused to current or future marine communications, including, but not limited, to Automatic Identification System (AIS) operations, and (2) if necessary, PacifiCorp will exercise its best efforts to adjust its operations in coordination with the maritime community so that the public safety needs of both

¹⁵ See 2006 Waiver Order, 21 FCC Rcd at 7763 ¶ 3; 2009 Waiver Order, 24 FCC Rcd at 5798 ¶ 5.

¹⁶ See Waiver Request at 3.

¹⁷ *Id.* at 8; see Amended Request for Rule Waiver (filed Dec. 16, 2008 by PacifiCorp and attached to FCC File Nos. 0001988156, 0001988415), at 7 n.11 (“Although the present applications do not propose assignment of channel 85 to PacifiCorp in the area that is within 20 miles of the Pacific ocean and Columbia River, PacifiCorp and MariTEL contemplate requesting consent to the assignment of channel 85 to PacifiCorp for [PMRS] use in the near future.”). Neither NTIA nor the Coast Guard has petitioned to deny, or otherwise indicated any opposition to, the present Applications and Waiver Request.

¹⁸ See Petition at 2-3.

¹⁹ See MariTEL, Inc., Order, 27 FCC Rcd 3256, 3259-62 ¶¶ 7-14 (WTB MD 2012), *recon. and review pending*.

²⁰ See Waiver Request at 2, 7-8; see also 2009 Waiver Order, 24 FCC Rcd at 5799 ¶ 9 (accepting the parties’ representation that the spectrum retained by MariTEL would be sufficient to accommodate maritime needs, but also noting that if “the spectrum retained by MariTEL proves insufficient to accommodate maritime needs in the region, ... the parties will be required to adopt other means to ensure against blocked or delayed marine-originating calls”).

²¹ See Waiver Request at 7.

PacifiCorp and the maritime community can be accommodated.²² As so conditioned, we conclude that grant of the waiver of Section 80.123(b) is warranted under Section 1.925(b)(3) of the Rules.²³ In the event that the spectrum retained by MarITEL proves insufficient to accommodate maritime needs in the region, however, the parties will be required to adopt other means to ensure against blocked or delayed marine-originating calls.

8. *Conclusion and Ordering Clauses.* For the reasons stated above, we grant PacifiCorp's waiver request, and will consent to the assignment applications for the requested frequencies. Because PacifiCorp's operations could, in some circumstances, present a potential for interference to maritime operations, or could preclude the use of these maritime frequencies in the national interest, the instant waiver request is granted on the express conditions that no interference is caused to current or future marine communications, including but not limited to AIS operations; and that, if necessary, PacifiCorp will exercise its best efforts to adjust its operations in coordination with the maritime community so that the public safety needs of both PacifiCorp and the maritime community can be accommodated. In addition, we deny the Petition, which provides no basis for dismissing, denying or deferring action on the Applications.

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(d), and Sections 1.41 and 1.939 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Dismiss or Deny, Or in the alternative Section 1.41 Request filed by Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC, Intelligent Transportation & Monitoring Wireless LLC, and Skybridge Spectrum Foundation on September 16, 2009, IS DENIED.

10. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 303(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the Request for Waiver of Part 80 of the Commission's Rules filed by PacifiCorp in association with applications with applications FCC File Nos. 0003941632 and 0003941633 IS GRANTED to the extent indicated above ON THE CONDITIONS set forth in paragraph 7.

11. IT IS FURTHER ORDERED that applications FCC File Nos. 0003941632 and 0003941633 SHALL BE PROCESSED consistent with this *Order* and the Commission's Rules.

12. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

²² See 2009 Waiver Order, 24 FCC Rcd at 5800 ¶ 11. PacifiCorp does not object to imposition of these conditions. See Waiver Request at 8.

²³ 47 C.F.R. § 1.925(b)(3). In addition, we accept PacifiCorp's certification that it will use the assigned spectrum for private mobile radio service (PMRS) operations. See Certification Pursuant to Section 20.9(b), attached to the Applications. We accordingly direct that the license to be issued to PacifiCorp, following its notification to the Commission of the consummation of the assignment, be designated as authorizing only PMRS use. VPC stations are presumptively treated as commercial mobile radio service providers, but VPC licensees are permitted to file applications to dedicate a portion of their spectrum for PMRS use and may be regulated as PMRS providers upon certifying that they will so operate. See 47 C.F.R. § 20.9(a)(5), (b).

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
ARIZONA WATER COMPANY) WT Docket No. 99-87
)
Request for Waiver of Section 90.209(b) of the)
Commission's Rules)

ORDER

Adopted: July 19, 2012

Released: July 20, 2012

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us the request of Arizona Water Company (the Company),¹ for a temporary waiver until January 1, 2014, of the Commission's VHF/UHF narrowbanding deadline, which requires private land mobile radio (PLMR) licensees in the 150-174 MHz and 421-512 MHz bands to operate using channel bandwidth of no more than 12.5 kHz or equivalent efficiency by January 1, 2013.² The Company seeks the extension for forty-one PLMR stations.³ For the reasons set forth below, we grant the request.

2. *Background.* Arizona Water Company provides water service to over 84,000 customers in 22 water systems throughout Arizona.⁴ Its water systems are located in mostly rural areas with diverse geographic and topographic settings.⁵ The Company's voice and telemetry radio systems consist of approximately 148 mobile or handheld voice radios, 13 voice radio base stations, and 70 telemetry radios.

¹ See Request for Waiver of Narrowbanding Deadline (filed Apr. 25, 2012) (Request). On June 5, 2012, comment was sought on the narrowbanding waiver request. See Wireless Telecommunications Bureau Seeks Comment on Arizona Water Company Request for Waiver of the January 1, 2013 VHF-UHF Narrowbanding Deadline, *Public Notice*, WT Docket No. 99-87, 27 FCC Rcd 6048 (WTB MD 2012). No comments were filed.

² 47 C.F.R. § 90.209(b); see also Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Third Memorandum Opinion and Order and Third Further Notice of Proposed Rule Making and Order*, WT Docket No. 99-87, RM-9332, 19 FCC Rcd 25045 (2004). On April 26, 2012, the Wireless Telecommunications Bureau, Public Safety and Homeland Security Bureau, and Office of Engineering and Technology waived the January 1, 2013 narrowbanding deadline for 470-512 MHz band frequencies. See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Order*, WT Docket No. 99-87, RM-9332, 27 FCC Rcd 4213 (WTB/PSHSB/OET 2012).

³ Stations KD6286, KDJ835, KDJ837, KMG566, KNDE487, KNDE488, KOK861, KOK863, KOK864, KOK865, KOK868, KOK869, KRW595, WNMA388, WNMA390, WNNN622, WNNN623, WNNN624, WNNN625, WNNQ257, WNNQ258, WNNQ259, WNUP702, WNUP703, WNVF591, WNVF801, WNYZ296, WNYZ297, WNZC481, WPPU979, WPXD917, WPXE223, WQKL785, WQKN639, WQNH231, WQNJ291, and WQNJ292. The Company also requested an extension for Stations KOK867, WNVF800, WNW749, and WPTJ527, but we note that those license have expired or been canceled.

⁴ See Request at 1.

⁵ Almost none of the communities served by the Company has a population in excess of 10,000 people.

Most of its radio equipment is not narrowband-capable, and therefore must be replaced to bring the Company into compliance with the Commission's narrowbanding mandate.⁶

3. The Company states that the number of technicians in these rural areas who are qualified to install or modify the specialized radio equipment deployed in its water production, water storage, water treatment and booster pump facilities is quite limited, which prevents it from completing all of the work necessary to complete the narrowbanding transition by January 1, 2013.⁷ It expects to finish reprogramming or replacing voice base stations by April 2013, telemetry radios by September 2013, and mobile and handheld voice radios by the end of 2013.⁸ It therefore requests a 12-month extension, until January 1, 2014, to replace and reprogram radio base stations and related site equipment throughout its system.

4. *Discussion.* To obtain a waiver of the Commission's Rules a petitioner must demonstrate either that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;⁹ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest or the applicant has no reasonable alternative.¹⁰ Applying this standard to narrowbanding, we have stated in the *Narrowbanding Waiver Guidance Notice*, jointly issued by the Wireless Telecommunications Bureau, the Public Safety and Homeland Security Bureau, and the Office of Engineering and Technology, that narrowbanding waiver requests "will be subject to a high level of scrutiny" under the waiver standard.¹¹ We have also provided recommended guidance on the factors that licensees should address in their requests and have recommended that in addressing these factors, licensees should seek to demonstrate that "(i) they have worked diligently and in good faith to narrowband their systems expeditiously; (ii) their specific circumstances warrant a temporary extension of the deadline; and (iii) the amount of time for which a waiver is requested is no more than is reasonably necessary to complete the narrowbanding process."¹² We conclude, under the circumstances presented, that strict enforcement of the deadline would be inequitable, unduly burdensome, and contrary to the public interest. In reaching this conclusion, we place significant weight on the showing that the Company has made with respect to the factors identified in the *Narrowbanding Waiver Guidance Notice*.

5. Based on the record before us, we conclude that Arizona Water Company has presented sufficient facts to meet the high standard for grant of the requested waiver. First, the record shows that the Company has been diligently preparing for the transition to narrowbanding by inspecting every piece of its radio equipment, securing contractors to perform reprogramming of designated equipment, and preparing a detailed schedule for the transition. The Company has already committed most of the necessary funds for the narrowbanding implementation, with the remaining funds to be allocated in

⁶ *Id.* at 1, 2.

⁷ *Id.* at 1, 3.

⁸ *Id.* at Attachment A.

⁹ 47 C.F.R. § 1.925(b)(3)(i).

¹⁰ 47 C.F.R. § 1.925(b)(3)(ii).

¹¹ Wireless Telecommunications Bureau, Public Safety and Homeland Security Bureau, and Office of Engineering and Technology Provide Reminder of January 1, 2013 Deadline for Transition to Narrowband Operations in the 150-174 MHz and 421-512 MHz Bands and Guidance for Submission of Requests for Waiver and Other Matters, *Public Notice*, 26 FCC Rcd 9647 (WTB/PSHSB/OET 2011) (*Narrowbanding Waiver Guidance Notice*).

¹² *Id.* at 9649.

2013.¹³ Because most of the Company's voice and telemetry radios are not narrowband-capable, the replacement of entire control system installations is necessary throughout Arizona.¹⁴ The reprogramming or replacement of the equipment will require securing qualified technicians, who are of limited availability in the Company's service areas.¹⁵ Strict application of the narrowbanding rules could result in interruption of the Company's communications, which could put the public health and safety at risk. Based on the size and complexity of the new system, and the necessity to maintain public utility water service to rural communities, we conclude that the twelve-month waiver period requested by the Company is no more than is reasonably necessary to complete narrowbanding.¹⁶

6. In addition, it does not appear that grant of the waiver will significantly harm neighboring systems. The Company operates in rural areas, and does not indicate that it has any interoperability or interdependence with other radio systems. We expect the Company to work with any impacted licensee to minimize interference.

7. *Conclusion and Ordering Clauses.* Based on the foregoing, we conclude that grant of the requested waiver is warranted. Accordingly, we grant Arizona Water Company a waiver of the Commission's January 1, 2013 VHF/UHF narrowbanding deadline until January 1, 2014 for Stations KD6286, KDJ835, KDJ837, KMG566, KNDE487, KNDE488, KOK861, KOK863, KOK864, KOK865, KOK868, KOK869, KRW595, WNMA388, WNMA390, WNNN622, WNNN623, WNNN624, WNNN625, WNNQ257, WNNQ258, WNNQ259, WNUP702, WNUP703, WNVF591, WNVF801, WNYZ296, WNYZ297, WNZC481, WPPU979, WPXD917, WPXE223, WQKL785, WQKN639, WQNH231, WQNJ291, and WQNJ292.

8. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), that the Request for Waiver of Narrowbanding Deadline filed by Arizona Water Company on April 25, 2012 IS GRANTED to the extent indicated above.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

¹³ Request at 2.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ See *Narrowbanding Waiver Guidance Notice*, 26 FCC Red at 9649 (waiver applicant should show that "the amount of time for which a waiver is requested is no more than is reasonably necessary to complete the narrowbanding process").



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
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News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
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DA 12-1160

Released: July 19, 2012

REQUEST FOR COMMENT REQUEST FOR EXEMPTION FROM COMMISSION'S CLOSED CAPTIONING RULES

CG Docket No. 06-181

Several entities have filed petitions for exemption from the closed captioning requirements, pursuant to Section 79.1 of the Commission's rules, 47 C.F.R. § 79.1, for the television programs they produce.¹ Petitioners claim that compliance would impose an "undue economic burden," as defined in Section 79.1(f) of the Commission's rules, 47 C.F.R. § 79.1(f).²

Comments and oppositions are due within 30 days from the date of this public notice. The case identifier must be placed on all filings. Comments and oppositions sent via e-mail to the Commission will be considered informal and are not part of the official record.

Filing Instructions

An original and two (2) copies of all comments, oppositions, and replies must be filed with the Commission.

Filings can be sent by hand or messenger delivery, commercial overnight courier, or by first class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal

¹ The names of the Petitioners are set forth in Attachment A.

² Prior to the enactment of the Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260, 124 Stat. 2751 (2010), (CVAA) in October 2010, petitioners seeking individual exemptions from the closed captioning requirements sought "undue burden" exemptions. Although the CVAA replaced the "undue burden" terminology with the term "economically burdensome," (47 U.S.C. § 613(d) as amended by Sec. 202(c) of the CVAA), in light of the CVAA's legislative history, the Commission adopted an Interim Order continuing to use the undue burden factors contained in Section 713(e) of the Act in evaluating petitions for individual captioning waivers. For a fuller discussion of this and related issues, see *Anglers for Christ Ministries, Inc.*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC Rcd 14941 at 14960, ¶36 (2011) ("*Anglers Reversal MO&O*"), which can be found at <http://transition.fcc.gov/cgb/dro/caption.html>. Accordingly, this proceeding will use the "economically burdensome" terminology and the four undue burden factors contained in section 713(e) in evaluating petitions.

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Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Attn: CGB Room 3-B431.

* Hand-delivered or messenger-delivered paper filings must be delivered to: Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

* Commercial overnight courier mail (other than U.S. Postal Service, Express Mail and Priority Mail) must be sent to: Office of the Secretary, Federal Communications Commission, Attention: Disability Rights Office, Room 3-B431, 9300 East Hampton Drive, Capitol Heights, MD 20743.

* U.S. Postal Service mail (including first-class, Express, and Priority Mail) should be addressed to: Office of the Secretary, Federal Communications Commission, Attention: Disability Rights Office, Room 3-B431, 445 12th Street, SW, Washington, DC 20554.

All comments and oppositions must be served on the petitioner. In addition, comments and oppositions filed must indicate that they have been served on the petitioner.

An original and two (2) copies of the petitioner's reply to the comments in the record are due 20 days after the comment deadline. Electronic filing is not available at this time. In addition, replies to comments or oppositions shall be served on the commenting or opposing party and shall include a certification that the commenter was served with a copy.

All comments, oppositions, and replies must contain a detailed, full showing, supported by affidavit or signed under penalty of perjury, of any facts or considerations relied on.

The petitions, comments, oppositions and replies will be available for public inspection in the Commission's Reference Information Center:

445 12th Street, S.W.
Washington, D.C. 20554
202-418-7094

The petitions, public notice, and decisions (when issued) can also be found at <http://www.fcc.gov/encyclopedia/economically-burdensome-exemption-closed-captioning-requirements>.

To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). This *Public Notice* can also be downloaded in Word and Portable Document Format at <http://www.fcc.gov/encyclopedia/economically-burdensome-exemption-closed-captioning-requirements>.

Consumer & Governmental Affairs Bureau Contact: Roger Holberg (202) 418-2134 (voice); e-mail roger.holberg@fcc.gov or Traci Randolph (202) 418-0569 (voice), (202) 418-0537 (TTY); e-mail traci.randolph@fcc.gov.

ATTACHMENT A

Case Identifier	Petitioner/Program Name	Address
CGB-CC-0327	Cathedral of the Palms / Faith Talk	3401 S. Alameda Street Corpus Christi, TX 78411
CGB-CC-0695	For Sale By Owner & Builder / Television Show of Homes	5300 Sidney Simons Blvd., Suite 11 Columbus, GA 31904

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DA 12-1161
July 19, 2012

DOMESTIC SECTION 214 AUTHORIZATION GRANTED

Domestic Section 214 Application Filed for the Transfer of Control of Keywest Communications (USA) Inc. to Sifa Technology Limited

WC Docket No. 12-7

On January 11, 2012, Keywest Communications (USA) Inc. (KCUSA). Key West Global Telecommunications Berhad (Keywest) and Sifa Technology Limited (SIFA) (collectively, the Applicants) filed an application, pursuant to section 63.03 of the Commission's rules,¹ to transfer control of KCUSA from Keywest to SIFA.

On February 15, 2012, the Bureau released a public notice accepting the application for streamlined processing.² On February 29, 2012, the Department of Justice, including the Federal Bureau of Investigation, with the concurrence of the Department of Homeland Security (collectively, the Executive Branch Agencies), filed a letter requesting that the Commission defer action on this application while they reviewed potential national security, law enforcement, and public safety issues.³ In response to the request, the Bureau removed the application from streamlined review.⁴ On July 18, 2012, the Executive Branch Agencies withdrew their request to defer action, stating that they have no objection to the application.⁵

The Bureau finds, upon consideration of the record, that grant of the application will serve the public interest, convenience, and necessity. Upon consummation of the transaction, the resulting entity would have a market share in the U.S. interstate interexchange market of less than 10 percent and would provide competitive telephone exchange services or exchange access services (if at all) exclusively in

¹ 47 C.F.R. § 63.03; *see* 47 U.S.C. § 214.

² *Domestic Section 214 Application Filed for the Transfer of Control of Keywest Communications (USA) Inc. to SIFA Technology Limited*, WC Docket No. 12-7, Public Notice, DA 12-221 (WCB 2012).

³ Letter from Christopher Hale, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 12-7 (filed Feb. 29, 2012).

⁴ *Notice of Removal of Domestic Section 214 Application From Streamlined Treatment*, WC Docket No. 12-7, Public Notice, DA 12-365 (WCB 2012).

⁵ Letter from Jennifer Rockoff, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 12-7 (filed July 18, 2012).

geographic areas served by a dominant local exchange carrier that is not a party to the transaction. In addition, neither of the Applicants are dominant with respect to any domestic service.⁶

Consistent with Commission precedent, the Bureau accords the appropriate level of deference to the Executive Branch Agencies' expertise on national security and law enforcement issues.⁷ Therefore, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, the Bureau hereby grants the application discussed in this Public Notice.⁸

Pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, the grant is effective upon release of this Public Notice. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of this Public Notice.

For further information, please contact Dennis Johnson at (202) 418-0809, Competition Policy Division, Wireline Competition Bureau.

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⁶ 47 C.F.R. 63.03(b)(2)(i).

⁷ The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing a transfer of control or assignment application in which foreign ownership is an issue. *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24170-72, paras. 178-82 (1997); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23919-21, paras. 61-66 (1997) (*Foreign Participation Order*), Order on Reconsideration, 15 FCC Rcd 18158 (2000). In assessing the public interest, the Commission considers the record and accords the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues. *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

⁸ A grant of the application will be without prejudice to any enforcement action by the Commission for non-compliance with the Communications Act of 1934, as amended, or the Commission's rules.



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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TTY (202) 418-2555

Report No. SAT-00884

DA No. 12-1162

Friday July 20, 2012

Policy Branch Information

Actions Taken

The Commission, by its International Bureau, took the following actions pursuant to delegated authority. The effective date of these actions is the release date of this Notice, except where an effective date is specified.

SAT-STA-20120531-00092 E S2811 EchoStar Satellite Operating Corporation

Special Temporary Authority

Grant of Authority

Effective Date: 07/18/2012

Nature of Service: Direct Broadcast Satellite Service

On July 18, 2012, the Satellite Division granted, with conditions, special temporary authority, for a period of 180 days, to EchoStar Satellite Operating Corporation to continue to operate the EchoStar 15 Direct Broadcast Satellite space station at the 61.65° W.L. orbital location on channels 1-22 and 25-32 using the 17.3-17.8 GHz (Earth-to-space) and 12.2-12.7 GHz (space-to-Earth) frequency bands.

SAT-STA-20120710-00112 E S2400 Intelsat License LLC

Special Temporary Authority

Grant of Authority

Effective Date: 07/18/2012

On July 18, 2012, the Satellite Division granted, with conditions, special temporary authority to Intelsat License LLC, for a period of 30 days, to continue to operate its Intelsat 701 space station at the 157.0° E.L. orbital location to provide Fixed-Satellite Service in the 3700-4200 MHz (space-to-Earth), 5925-6425 MHz (Earth-to-space), 10.95-11.2 GHz (space-to-Earth), 11.45-11.70 GHz (space-to-Earth), 11.7-11.95 GHz (space-to-Earth), 12.5-12.75 GHz (space-to-Earth), and 14.0-14.5 GHz (Earth-to-space) frequency bands. Intelsat is also authorized to continue telemetry, tracking, and control operations necessary to maintain Intelsat 701 at the 157.0° E.L. orbital location, using the following center frequencies: 3947.5 MHz (space-to-Earth), 3948.0 MHz (space-to-Earth), 3952.5 MHz (space-to-Earth), 3952.0 MHz (space-to-Earth), 6173.7 MHz (Earth-to-space), and 6176.3 MHz (Earth-to-space).

SAT-STA-20120711-00115 E S2811 EchoStar Satellite Operating Corporation

Special Temporary Authority

Grant of Authority

Effective Date: 07/18/2012

Application listed in IBFS as granted to reflect operations pursuant to Section 1.62 of the Commission's rules, 47 C.F.R. 1.62. See also IBFS File No. SAT-STA-20120531-00092 (granted July 18, 2012).

SAT-STA-20120716-00116 E S2110 Iridium Constellation LLC

Special Temporary Authority

Grant of Authority

Effective Date: 07/18/2012

On July 18, 2012, the Satellite Division granted special temporary authority to Iridium Constellation LLC for a period of 30 days to co-locate one of its spare in-orbit satellites with another satellite in its orbital constellation.

For more information concerning this Notice, contact the Satellite Division at 202-418-0719; TTY 202-418-2555.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
WAYNE COUNTY SHERIFF DEPARTMENT) FCC File No. 0003061539
)
Request for Waiver of Section 90.20(d)(54) of the)
Commission's Rules)

ORDER

Adopted: July 19, 2012

Released: July 20, 2012

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The Wayne County Sheriff Department, Indiana (the Department) has filed an application and a request for waiver seeking authorization to use frequency 173.210 MHz for analog voice operations.¹ Specifically, the Department requests a waiver of Section 90.20(d)(54) of the Commission's rules² (limitation 54) to operate at 20 kilohertz bandwidth on frequency 173.210 MHz, which has a bandwidth limitation of 3 kilohertz and is not available for analog voice operations.³ For the reasons discussed below, we grant the waiver request subject to certain conditions herein and hold the application in abeyance for up to 60 days pending an amendment.

II. BACKGROUND

2. The Department currently operates in the VHF band under call signs WQGS538 and KBJ645.⁴ The Department states that "[c]urrent VHF portable radios must provide the flexibility of direct communications from officers who are outside of their vehicles"⁵ and that "[v]ehicular repeaters are the only method of accomplishing this critical communications."⁶ To fulfill this need, the Department "purchased VHF high-band simplex mobile repeater units in support of hand-held communications for the officers."⁷

¹ File No. 0003061539 and associated files, filed June 6, 2008: Waiver – Timely Action Requested (Waiver Request) and letter from Paul M. Strittmatter, Sheriff, and Jim Daggy, Captain/Enforcement Commander, Wayne County, Indiana, to Federal Communications Commission (dated May 16, 2007).

² 47 C.F.R. § 90.20(d)(54).

³ See Waiver Request at 1. Frequency 173.210 MHz is shared between the Public Safety and Industrial/Business Pools. See 47 C.F.R. §§ 90.20(c)(3), 90.20(d)(34), 90.35(b)(3).

⁴ Station WQGS538 has base station operation on frequency 151.220 MHz and low-powered portable mobile operation on frequency 159.045 MHz. Station KBJ645 has base station operations on frequencies 155.130, 155.370, and 155.580 MHz; and mobile operation (both high-powered vehicular and low-powered portable) on frequencies 154.830, 154.890, 155.130, and 155.475 MHz.

⁵ Waiver Request at 1.

⁶ *Id.*

⁷ Letter at 1.

3. Specifically, the Department seeks to license Synthesized Vehicular Repeater (SVR) equipment manufactured by Pyramid Communications, Inc. (Pyramid)⁸ for use on frequency 173.210 MHz with an effective radiated power (ERP) of one watt.⁹ The Department seeks to use “an emission designator of 20K0F3E to allow the operation of a vehicular repeater which must interface and be compatible with existing VHF high band fixed and mobile radios which operate with that emission.”¹⁰ It states that “[i]f a narrowband emission is used for frequency 173.210 MHz, the audio ... will be distorted and in some cases unintelligible [and] ... [c]ould result in the loss of life for Police officers.”¹¹ The Department notes that “[t]hese are low power units and require only several hundred feet of coverage from the patrol cars.”¹² The Department proposes a circular area of operation with a 24-kilometer radius that extends beyond the borders of the county. However, the Department notes that “the mobile units will not travel outside the county.”¹³

4. The Department requests a frequency in the 173.2-173.4 MHz band rather than in the 150-160 MHz band on the grounds that “interference ... can occur between the mobile radio and SVR operating within the same VHF band.”¹⁴ To avoid such interference, the Department’s consultant notes that “the manufacturer has recommended ... a separation of at least 10 MHz between the mobile [transmit frequency] and SVR frequency while using these units in band.”¹⁵ The Department contends that “[t]here are no co-channel users that will be impacted.”¹⁶

5. The Department states that “Wayne County is an economically disadvantaged area, the population base is small, and funds are not available to purchase radios in another band.”¹⁷ The Department states that it “elected to go with VHF simplex mobile repeaters for our application because it would be compatible with all of our existing VHF hand-held radios.”¹⁸ The Department argues that it “has no reasonable alternative than to seek the waiver ... due to the investment in the existing system and

⁸ See Letter from Gary A. Green, Tech Electronics & Communications, to Thomas Eng. Federal Communications Commission at 1 (dated Apr. 1, 2009) (Green Letter). Pyramid’s SVR equipment is certified for 16 kHz and 11 kHz bandwidth operation in the 150-174 MHz band in the Commission’s Equipment Authorization database. See FCCID LRUSVR-200VB. We note that Pyramid has filed a separate Petition for Rulemaking requesting that the Commission consider rule changes to facilitate the use of vehicular repeater units in the VHF band by Public Safety licensees. See Modification of Sections 90.20(d)(34) and 90.265 of the Commission’s Rules to Facilitate the Use of Vehicular Repeater Units, RM-11635, Petition for Rule Making, filed by Pyramid Communications, Inc. (filed Aug. 16, 2011). In its petition, Pyramid identifies certain frequencies in the 170 MHz band that it contends would be suitable for vehicular repeater use, but the identified frequencies do not include frequency 173.210 MHz. In this order, we do not consider, address, or prejudge the issues raised in Pyramid’s petition, but limit our analysis and base our decision solely on the facts presented in the Department’s waiver request.

⁹ See FCC File No. 0003061539.

¹⁰ Waiver Request at 1. The emission designator “20K0F3E” has a bandwidth of 20 kHz and indicates a frequency modulated signal carrying analog voice information. See 47 C.F.R. §§ 2.201, 2.202, 90.207.

¹¹ Waiver Request at 1. Frequency 173.210 MHz has a bandwidth limitation of 3 kHz. See 47 C.F.R. § 90.20(d)(54).

¹² Letter at 1.

¹³ See File No. 0003061539, attached Letter (unsigned) to Federal Communications Commission (dated Jan. 12, 2006).

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ Waiver Request at 1. See also File No. 0003061539, attached ComStudy plot.

¹⁷ Waiver Request at 1.

¹⁸ See Letter at 1.

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the replacement costs which exceeds the budget of the county.”¹⁹ The Department seeks to avert a solution involving another band such as UHF because “it would require the purchase of fifty new UHF radios and repeaters at considerable cost,” and “[t]he officers would then be required to carry a second hand-held radio while on duty.”²⁰ The Department maintains that “our current VHF radio system is 100% interoperable with all other agencies within and surrounding Wayne County Indiana.”²¹ The Department states that “[t]he grant of this waiver is in the [p]ublic interest and would not frustrate the intent of the current rules.”²²

6. A grant to use an “F3E” emission designator for analog-modulated voice operations²³ on frequency 173.210 MHz would require waivers of two other technical limitations besides limitation 54. First, the Department would require a waiver of limitation 36, which only allows digital modulation and data, telemetry, and telecommand information on this frequency.²⁴ Second, the Department would require a waiver of limitation 34²⁵ because the Department would conduct neither remote control nor telemetry operations on the frequency, but rather voice operations. Accordingly, the Department requires a waiver of limitations 34, 36, and 54.

7. On April 15, 2009, the Public Safety and Homeland Security Bureau (Bureau) placed the Department’s request on public notice.²⁶ The Bureau sought comment on the waiver request in light of the Commission’s January 1, 2013 narrowbanding deadline in the 150-174 MHz and 421-512 MHz bands, which requires land mobile radio systems in those bands to migrate to 12.5 kilohertz bandwidth channels or the equivalent efficiency.²⁷ The Department proposes a 20 kilohertz bandwidth emission, which would be prohibited as of January 1, 2013, unless the Department meets the 12.5 kilohertz narrowbanding standard.²⁸ The Bureau sought comment on whether a waiver grant should be conditioned on the Department migrating from 20 kilohertz to 12.5 kilohertz bandwidth or equivalent efficiency on frequency 173.210 MHz by January 1, 2013.²⁹ The Commission received one comment on this issue from the Enterprise Wireless Alliance (EWA).³⁰ While EWA takes no position on the merits of the waiver request, it urges the Commission to condition any waiver grant on the Department meeting the narrowbanding requirement by January 1, 2013.³¹

¹⁹ Waiver Request at 1.

²⁰ Letter at 1.

²¹ *Id.*

²² Waiver Request at 1.

²³ The “F” symbol indicates frequency modulation; the “3” symbol indicates analog modulation, and the “E” symbol indicates voice operations. See 47 C.F.R. § 90.207.

²⁴ See 47 C.F.R. § 90.20(d)(36).

²⁵ 47 C.F.R. § 90.20(d)(34). “This frequency is available on a shared basis with the Industrial/Business Pool for remote control and telemetry operations.” *Id.*

²⁶ See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed by the Wayne County Sheriff’s Department, Indiana to Permit Wideband, Analog Voice Operations on a Narrowband Telemetry Frequency, *Public Notice*, 24 FCC Rcd 4593 (PSHSB 2009) (*Public Notice*).

²⁷ *Id.*, 24 FCC Rcd at 4595.

²⁸ See File No. File No. 0003061539; 47 C.F.R. §§ 90.209(b)(5) note 3; 90.203(j)(3).

²⁹ *Public Notice* at 4595.

³⁰ See Comments of Enterprise Wireless Alliance, filed May 6, 2009, at 3.

³¹ *Id.*

III. DISCUSSION

8. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;³² or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.³³ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.³⁴

9. The Department argues that under the second prong of the waiver standard, it faces unique or unusual factual circumstances because it "is an economically disadvantaged area, the population base is small, and funds are not available to purchase radios in another band."³⁵ The Department also argues that failure to obtain a waiver would be unduly burdensome because a solution involving another band would require it to purchase new radios at considerable cost, and that in light of this prospect and existing sunk costs it has no reasonable alternative than to seek the instant waiver.³⁶ We note that while financial hardship may constitute a factor in our determination of whether a waiver is appropriate, it is not the sole determinative factor in a waiver analysis.³⁷

10. We also consider whether the applicant has any reasonable alternative. The Department asserts that 10 megahertz frequency spacing is required between the mobile and SVR frequencies.³⁸ Our independent analysis of Pyramid Communications' equipment revealed that optional filters could reduce the required frequency spacing down to two megahertz.³⁹ Thus, we examined whether the Department could use a Public Safety Pool frequency in the 150-160 MHz band that permits wideband, analog voice operation. The Department provided a VHF frequency search containing a list of all Public Safety Pool VHF frequencies and incumbent licensees located within 100 kilometers of the Department's center point coordinates.⁴⁰ Our independent analysis of the frequency search revealed no available frequency that is spaced more than two megahertz from the Department's licensed mobile frequencies.⁴¹ Thus, we find that no other reasonable alternatives are available to the Department. We therefore conclude that the Department satisfies the second prong of the waiver standard.

11. Although the American Association of State Highway and Transportation Officials coordinated the Department's application,⁴² we are concerned that authorizing the Department to operate at the increased bandwidth required to support voice operations could cause co-channel interference to

³² 47 C.F.R. § 1.925(b)(3)(i).

³³ 47 C.F.R. § 1.925(b)(3)(ii).

³⁴ *WAT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corporation. Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

³⁵ Waiver Request at 1.

³⁶ *See supra* ¶ 5.

³⁷ *See Wilderness Valley Telephone Company. Order*, 15 FCC Rcd 11751, 11752-53 ¶ 6 (WTB PSPWD 2000).

³⁸ *See supra* ¶ 4.

³⁹ *See* <http://www.pyramidcomm.com/filters.html> (last visited September 9, 2010).

⁴⁰ *See* File No. 0003061539, attached ComStudy frequency search (Frequency Search).

⁴¹ *See id.* *See supra* n.4 for the Department's mobile frequencies.

⁴² Frequency Coordinator No. 05110312510510835. AASHTO is a Commission-certified frequency coordinator.

nearby incumbent stations,⁴³ especially given the incompatibility of voice operation with incumbent remote control and telemetry operation. We are also concerned that the increased bandwidth on frequency 173.210 MHz would overlap the bandwidth of adjacent frequencies 173.20375 and 173.225 MHz.⁴⁴ To mitigate these concerns, we therefore limit the Department's operation on frequency 173.210 MHz to operation on a secondary, non-interfering basis to all primary stations on frequencies 173.20375, 173.210, and 173.225 MHz that are authorized as of the grant date of the Department's application.⁴⁵ We are also concerned that the Department's proposed operating area, which is defined by coordinates with a 24-kilometer radius, would extend coverage beyond the county borders and could introduce unnecessary potential for interference to other incumbent stations. Moreover, the Department has stated that its mobile units will not travel outside the county.⁴⁶ To ensure efficient use of spectrum and avoid unnecessary interference to other spectrum users, it is important for a station license to reflect actual operating parameters. Therefore, we instruct the Department to amend its application within 60 days to change the mobile area of operation of Location 1 to the borders of Wayne County, consistent with the mobile area of the Department's Station KBJ645.

12. We also note that the application lists 160 units with station class code "MO."⁴⁷ This is the class code for mobile or portable units; vehicular repeaters have a different class code of "MO3" that is not present on the application.⁴⁸ Therefore, in the same application amendment, we instruct the Department to specify the quantity of vehicular repeaters using the "MO3" station class code.⁴⁹ We will hold the application in abeyance for 60 days after the release of this Order or until the Department amends the application, whichever comes first. If the Department fails to file a satisfactory amendment within 60 days, we will dismiss the application.⁵⁰

13. We agree with EWA that the Department should be obligated under this waiver to meet the January 1, 2013 narrowbanding deadline with respect to operations on frequency 173.210 MHz.⁵¹ The Department's regular VHF licenses are subject to the narrowbanding requirement. Thus, if the Department were to continue to operate at 20 kilohertz bandwidth on frequency 173.210 MHz after the Department has transitioned its other VHF facilities to narrowband operations, communications quality

⁴³ See, e.g., co-channel Stations KNJB955, KNNQ682, WNAN628, KNNQ687, WNQN453, WNQN362, WNQN366, WPBR643, WPBR644 (Southwest Regional Water District, Hamilton, Ohio), and WPCB648 (Town of Ingalls, Indiana).

⁴⁴ Frequency 173.20375 MHz has a bandwidth limit of 6 kHz. See 47 C.F.R. § 90.20(d)(33). The separation between the two frequencies is 6.25 kHz. There is a wider separation of 15 kHz between frequency 173.210 MHz and the other adjacent frequency, 173.225 MHz.

⁴⁵ Secondary operations are "radio communications which may not cause interference to operations authorized on a primary basis and which are not protected from interference from those primary operations." 47 C.F.R. § 90.7.

⁴⁶ See *supra* para. 3. On File No. 0003061539, Form FCC 601, Schedule D, Location 1, the Department should change Item 4 from "P" to "C" to reflect county wide area of operation, and enter "Wayne County, IN" in Item 3. The Department should delete the coordinates and radius in Items 7, 8, and 18.

⁴⁷ See File No. 0003061539.

⁴⁸ See Form FCC 601, Schedule H – Instructions at 5.

⁴⁹ On File No. 0003061539, Form FCC 601, Schedule H, the Department should complete Items 19-37, as applicable, for the vehicular repeaters. In particular, the Department should enter "1" in Item 20 to use the same mobile area of operation as regular mobile units. Next, the Department should enter "173.210" for the frequency in Item 31, and "MO3" for the station class in Item 32. The Department should specify the quantity of vehicular repeaters in Item 33.

⁵⁰ The Department would have the option to reapply for frequency 173.210 MHz consistent with the terms of this Order, in which case the Department should attach a copy of this Order as an exhibit.

⁵¹ 47 C.F.R. § 90.209(b)(5) note 3.

between the two systems could be degraded. Accordingly, we condition the waiver on the Department migrating its operations on frequency 173.210 MHz to 12.5 kilohertz bandwidth or equivalent efficiency by January 1, 2013.

14. We recognize that the public interest supports the Department's goal to ensure that officers are able to communicate with handheld radios outside of their vehicles. However, we advise the Department and the public safety community in general against investing in communications equipment without first ensuring that they can obtain proper authorization to use such equipment, especially if it appears that the equipment cannot operate on available public safety spectrum or would otherwise require a waiver of the Commission's rules.

IV. CONCLUSION

15. Because we find that the Department has met the criteria to obtain a waiver of Sections 90.20(d)(34), (36), and (54), we grant the waiver request with the following conditions:

- "Operation on frequency 173.210 MHz is on a secondary, non-interfering basis to all primary stations on frequencies 173.20375, 173.210, and 173.225 MHz that are authorized as of the initial grant date of this station."
- "Beginning January 1, 2013, this station must operate on channels with a bandwidth of 12.5 kHz or less, or with equivalent efficiency, regardless of the emission bandwidths set forth on this license. See Section 90.209(b)(5) of the Commission's Rules."

In addition, we instruct the Department to file an application amendment within 60 days to change the mobile area of operation to county-wide, and to specify the quantity of vehicular repeaters with the "MO3" station class code. We will hold the application in abeyance for 60 days after the release date of this order to allow the Department to file such an application amendment.

V. ORDERING CLAUSES

16. Accordingly, WE ORDER that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver of Section 90.20(d)(54) of the Commission's rules, 47 C.F.R. § 90.20(d)(54), filed by the Wayne County Sheriff's Department, Indiana, on June 6, 2007, IS GRANTED, as conditioned herein.

17. WE FURTHER ORDER that we SHALL HOLD IN ABEYANCE application File No. 0003061539 for up to 60 days from the release date of this Order to allow Wayne County Sheriff's Department, Indiana to amend application File No. 0003061539 consistent with the instructions in this Order.

18. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau



Federal Communications Commission
Washington, D.C. 20554

DA 12-1164

July 19, 2012

Mr. Frankie Winsett
Chameleon Communications Group, Inc.
402 N. Carolina Ave.
Palm Harbor, FL 34683

Call Sign: E120096
File No.: SES-LIC-20120531-00484

Dear Mr. Winsett:

On May 31, 2012, Christian Television of Palm Beach County, Inc. (Christian Television) filed the above-captioned application for a Fixed Satellite Service (FSS) C-band earth station license to provide digital video programming to affiliated stations. Pursuant to Section 25.112(a) of the Commission's rules,¹ we dismiss the application as defective without prejudice to refiling.²

Section 25.112(a) of the Commission's rules requires the Commission to return, as unacceptable for filing, any earth station application that is not substantially complete, contains internal inconsistencies, or does not substantially comply with the Commission's rules. The deficiencies are as follows:

The application contains inconsistent statements regarding the frequency ranges of the earth station operations. Responses to FCC Form 312 items 24 and 26 of indicate that the earth station will transmit and receive in C-band "(4/6GHz)" frequencies, but the response to item E43/44 of Schedule B indicates it will transmit on frequencies in the 6425-9525 MHz frequency band.³ Section 25.201 of the Commission's rules defines C-band as specifically the 3700-4200 MHz downlink and 5925-6425 MHz uplink frequency bands.⁴ Also, please note that not all parts of the 6425-9525 MHz frequency band are allocated for Fixed Satellite Service. Therefore, the application does not comply with Sections 25.201 (Definitions) and Section 2.106 (Table of Frequency Allocations) of the Commission's rules.⁵

¹ See 47 C.F.R. § 25.112.

² If Christian Television refiles an application identical to the one dismissed, with the exception of supplying the corrected information, it need not pay an application fee. See 47 C.F.R. § 1.1111(d).

³ Christian Television did not identify a proposed receive (space-to-Earth) frequency range in its application.

⁴ See 47 C.F.R. § 25.201.

⁵ See 47 C.F.R. § 2.106 Table of Frequency Allocations.

The response to FCC Form 312 Schedule B items E38 (total input power at antenna flange) and E41 (antenna gain transmit) indicate that the level in item E40 (total EIRP for all carriers) should be 58.68 dBW rather than 64.9 dBW.⁶ Therefore the application contains internal inconsistencies.

Section 2.201 of the Commission's rules requires a specific format for designating emission, modulation, and transmission characteristics.⁷ The responses to Schedule B item 47 do not comply with the format prescribed by Section 2.201 of the Commission's rules.

The application did not include a current frequency coordination report as required by Sections 25.203 and 25.115(c) (2) (iii), of the Commission's rules⁸ and clarified by question 15 of the FCC website, "Frequently Asked Questions (FAQ): Processing of Earth Station Applications",⁹ that earth station applications must include Frequency Coordination and Interference Analysis Reports that are not older than 6 months from the date the earth station application is filed. Christian Television filed its application on May 31st 2012.¹⁰ The frequency coordination report submitted with its application is dated June 9, 2011 - a gap of one year between the filing and the date of the frequency report. Therefore the application is incomplete.

Furthermore, the expired frequency report that was submitted contains the following inconsistencies:

- The emission designations are not consistent throughout the report. It is not clear whether emission designators 2M50G1F, 2M50G7D or 3M70G1D, 3M70G1F were coordinated
- The emission data power densities are below the values requested in item 49 of Schedule B.
- The report indicates that it was submitted to all coordinators on May 3, 2011,¹¹ but the data attach to the report is dated 4/29/11.¹² This makes it appear that the report submitted for this application had the wrong data attachment.

Finally, we request clarification regarding Christian Television's proposed point of contact: Intelsat-16. In response to question 22 of FCC Form 312, Christian Television indicates that it seeks to operate with "non-U.S. licensed satellites." In other parts of its application, however, Christian Television lists Intelsat-16 as its intended point of communication. Our records show

⁶ $EIRP = 10 \log (\max. \text{ input power proposed}) + \text{Transmit antenna Gain proposed}$
 $= 10 \log (19 \text{ W}) + 45.9 = 58.68 \text{ dBW}.$

⁷ See 47 C.F.R. § 2.201.

⁸ See 47 C.F.R. §§ 25.203 and 25.115(c) (2) (iii).

⁹ <http://transition.fcc.gov/ib/sd/csa/faq.html#FAQ15>

¹⁰ See SES-LIC-INTRO2012-01343.

¹¹ See Attachment "Coordination report" to SES-LIC-20120531-00484 page 5.

¹² *Id* page 6.

that Intelsat-16 is a United States licensed satellite, call sign S2750, authorized to operate only in the Ku/extended Ku-bands and not the conventional C-band.

Accordingly, pursuant to Section 25.112 (a) (1) of the Commission's rules¹³, and Section 0.261 of the Commission's rules on delegations of authority¹⁴, we dismiss Christian Television's application.

Sincerely,

Paul E. Blais
Chief, Systems Analysis Branch
Satellite Division
International Bureau

¹³ See 47 C.F.R. § 25.112(a) (1).

¹⁴ See 47 C.F.R. § 0.261.



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 12-1165

Released: July 19, 2012

**OFFICE OF NATIVE AFFAIRS AND POLICY,
WIRELESS TELECOMMUNICATIONS BUREAU, AND
WIRELINE COMPETITION BUREAU ISSUE FURTHER GUIDANCE ON
TRIBAL GOVERNMENT ENGAGEMENT OBLIGATION PROVISIONS OF THE
CONNECT AMERICA FUND**

WC Docket Nos. 10-90, 07-135, 05-337, 03-109
CC Docket Nos. 01-92, 96-45
WT Docket No. 10-208
GN Docket No. 09-51

I. INTRODUCTION AND SUMMARY

1. By this Public Notice, the Federal Communications Commission's (FCC or Commission) Office of Native Affairs and Policy (ONAP), in coordination with the Wireless Telecommunications and Wireline Competition Bureaus (the Bureaus), provides further guidance on the Tribal engagement obligation adopted in the *USF/ICC Transformation Order*.¹ This document is intended to facilitate the required discussions between Tribal government officials and communications providers either currently providing or seeking to provide service on Tribal lands with the use of Universal Service Fund (USF) support.²

2. The broad goal of the guidance provided today, and future efforts to establish best practices, is to ensure the effective exchange of information that will lead to a common understanding between Tribal governments and communications providers receiving USF support, on the deployment and improvement of communications services on Tribal lands. The Tribal engagement obligation is intended to benefit Tribal government leaders, service providers, and consumers living on Tribal lands, ultimately providing greater connectivity to 21st century economic opportunities, education, health care, and public safety. This obligation is related to the very essence of universal service – facilitating and supporting connectivity to and from the most remote areas of our nation inures to the benefit of all. Requiring Tribal engagement is intended to begin and, in some cases, to strengthen, the dialogue between communications providers and Tribal governments. We anticipate that genuine dialogue and common understandings will ultimately lead to improvement of communications services on Tribal lands.

¹ See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 at 17868-69, para. 637 (2011) (*USF/ICC Transformation Order*): *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011).

² See *id.* In the context of the *USF/ICC Transformation Order*, "Tribal lands" is defined as "any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements [sic] Act (85 Stat. 688), and Indian Allotments, see 47 C.F.R. § 54.400(e), as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 108, *et seq.*, as amended." *Id.* at para. 125, n.197.

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3. Good guidance, by definition, must include assistance on how to undertake an endeavor with an aim towards success. Any attempt at actual and meaningful dialogue must be predicated on the genuineness of the intent on both sides. This engagement cannot be viewed as simply another “check the box” requirement by either party. In many places, we expect that there are good and productive relationships between communications providers and Tribal Nations. To the extent that there might be existing differences, however, the parties should put aside those differences for the purposes of this engagement. This engagement process should not be approached as an adversarial undertaking. Instead, Tribal governments and carriers should take advantage of the engagement to improve communications and foster a greater common understanding of the factors necessary to deploy and sustain services on Tribal lands, as well as an honest dialogue to learn from one another what factors would lead to success in those endeavors. In all cases, a high degree of receptivity and responsiveness is necessary to achieve meaningful dialogue, as well as confidence in the reliability of information exchanged. Candid and sincere dialogue on both sides will minimize the possibility that unreasonable expectations by either party will derail common understandings and genuine solutions.

4. Creating a substantive, meaningful dialogue is an iterative process, one which, in certain regions, is at its earliest stages of development. In a similar sense, the further guidance contained in this Public Notice represents the first step in the Commission’s implementation of the Tribal engagement obligation. We recognize that priorities and plans of individual Tribal governments and individual service providers can vary greatly, as do the existing relationships between Tribal governments and carriers currently serving Tribal lands. Therefore, there is no one size fits all guidance that can be provided that will be universally applicable. As a result, the guidance provided herein is somewhat general in nature at this stage, but we anticipate that our guidance, as well as the development of best practices, will evolve over time based on initial implementation experiences and the feedback of both Tribal governments and communications providers.

5. ONAP, in coordination with the Bureaus, will track and monitor this feedback and will develop further guidance in the form of best practices based on actual experiences.³ In an effort to further facilitate engagement efforts at this initial stage, ONAP will employ training and industry meeting opportunities, as well as its coordination events with Tribal Nations. These efforts will include, for example, working with national and regional communications industry associations and national and regional inter-Tribal government associations and organizations.⁴ ONAP will focus particular efforts -- for example, by identifying commonalities, increasing efficiencies, building upon current working relationships, and engaging all regional stakeholders, as appropriate -- to foster engagement in states and regions in which Tribes and providers are particularly remote and in which Tribes are particularly numerous.⁵ ONAP, in coordination with the Bureaus, will continue to serve as a resource for Tribal governments and communications providers and is always available for individually tailored assistance.

³ See *id.* at para. 637, n.1054 (directing ONAP, in coordination with the Bureaus, to develop best practices).

⁴ See Letter from the Hon. Mark Begich, United States Senator, State of Alaska; the Hon. Lisa Murkowski, United States Senator, State of Alaska; and the Hon. Don Young, United States Congressman, State of Alaska, to the Hon. Julius Genachowski, Chairman, FCC, dated Feb. 22, 2012 (“[W]e request that you work with the tribal groups, carriers and the State of Alaska to clarify the tribal consultation requirements included in the reform order”). See also Letter of Becky Hultberg, Commissioner, Department of Administration, State of Alaska, to the Hon. Julius Genachowski, Chairman, FCC, dated February 17, 2012.

⁵ For example, there are 229 federally recognized Tribes in Alaska, 108 in California, 38 in Oklahoma, 23 in New Mexico, and 21 in Arizona. See Federal Register Notice – Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010). See also Supplemental Federal Register Notice – Indian Entities 1 Page Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs, 75 Fed. Reg. 66,124 (Oct. 27, 2010).

II. BACKGROUND

6. In the *USF/ICC Transformation Order*, the Commission adopted a Tribal engagement requirement for all eligible telecommunications carriers (ETCs) either currently serving or seeking to serve Tribal lands.⁶ The Commission agreed with commenters that engagement between Tribal governments and communications providers is vitally important to the successful deployment of and provision of service on Tribal lands.⁷

7. The Commission therefore required, at a minimum, that ETCs demonstrate on an annual basis that they have meaningfully engaged with Tribal governments in their universal service supported areas.⁸ At a minimum, the *USF/ICC Order* stated that such discussions must include: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.⁹ Failure to satisfy the Tribal engagement obligation will subject ETCs to financial consequences, including potential reduction in universal service support should they fail to fulfill their engagement obligations.¹⁰

8. In requiring Tribal engagement, the Commission did not intend to supplant its own ongoing obligation to consult with Tribes on a government-to-government basis, but instead recognized the important role that all parties play in expediting communications service to Tribal lands throughout the nation, including in Alaska and Hawaii.¹¹ ETCs will be required to submit to the Commission and appropriate Tribal government officials an annual certification and summary of their compliance with the Tribal government engagement obligation as part of the new Connect America Fund reporting requirements.¹² The Commission defined appropriate Tribal government officials as elected or duly authorized government officials of federally recognized American Indian Tribes and Alaska Native Villages.¹³ For Hawaiian Home Lands, this engagement must occur with the State of Hawaii Department of Hawaiian Home Lands and the Office of Hawaiian Affairs.¹⁴ The Commission delegated to ONAP, in coordination with the Bureaus, the authority to develop specific procedures regarding the Tribal

⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17868-69, para. 637.

⁷ *Id.* Mobility Fund and Tribal Mobility Fund Phase I winning bidders will be required to comply with this Tribal engagement obligation at the long-form application stage, in annual reports, and prior to any disbursement of support. *Id.* at para. 489. We note, however, that any such engagement must be done consistent with our auction rules prohibiting certain communications during the competitive bidding process. *Id.* at para. 810. In the *Further Notice of Proposed Rulemaking*, the Commission proposed to apply the same Tribal engagement obligation to Phase II of the general and Tribal Mobility Funds and sought comment on that proposal. *Id.* at para. 1166.

⁸ *Id.* at para. 637. See also 47 C.F.R. §§ 54.313(a)(9), 54.1004(d), 54.1009.

⁹ *Id.*

¹⁰ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17868-69, para. 637.

¹¹ *Id.*

¹² *Id.* See also *id.* at para. 575 (“Under this uniform framework, ETCs will provide annual reports and certifications regarding specific aspects of their compliance with public interest obligations to the Commission, USAC [the Universal Service Administrative Company], and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate by April 1 of each year.”) See generally *id.* at paras. 576-606 (articulating specific reporting requirements). See also *Connect America Fund*, WC Docket No. 10-90 *et al.*, Order, 27 FCC Rcd 2142 at 2144-47, paras. 4-14 (2012) (*USF/ICC Clarification Order*) (revising and clarifying certain reporting obligations for recipients of Connect America Fund support).

¹³ *USF/ICC Transformation Order*, 26 FCC Rcd at 17869, para. 637, n.1053.

¹⁴ *Id.*

engagement process, as necessary.¹⁵ The Commission also directed ONAP, in coordination with the Bureaus, to develop best practices regarding the Tribal engagement process to help facilitate these discussions.¹⁶

III. FURTHER GUIDANCE ON THE TRIBAL GOVERNMENT ENGAGEMENT OBLIGATION

A. Overview/General Guidance

9. As stated above, the purpose of this guidance is to ensure the effective exchange of information between Tribal governments and communications providers concerning the deployment and improvement of communications services on Tribal lands throughout the nation, including in Alaska and Hawaii. This exchange of information should foster new opportunities for genuine dialogue that could achieve an alignment of interests and goals. Between certain carriers and Tribal governments, this will be an opportunity for introduction and dialogue in the first instance. In other parts of the country, this will be an opportunity for a new depth of dialogue and more meaningful interaction. An important goal of this guidance is the achievement of a level of engagement between principals on both sides that represents collaborative discussions and actual live conversation.¹⁷ We encourage stakeholders to go beyond merely perfunctory exchanges of basic documents, simplistic sales or marketing presentations, or one-dimensional lists of demands.

10. It is imperative that this dialogue be undertaken at a level within communications providers and Tribal governments that is commensurate with this important engagement requirement. The discourse should be between decision-makers on both sides. While it may be necessary to include administrative staff on both sides to administer and maintain the continuity of relations, this engagement cannot be merely between sales and marketing individuals on one side and administrative staff or advisors on the other. The perspectives on needs, expectations, priorities, and abilities that would formulate meaningful exchange often can come only from those with the requisite authority to make decisions.

11. On the Tribal government side, there are certain actions that should be taken to best prepare for this valuable engagement. It is important for Tribal leaders to recognize and act upon this opportunity to become organized, maintain continuity, and provide for certainty in conveying their communications needs and priorities. The Commission has long recognized the right of sovereign Tribal governments “to set their own communications priorities and goals for the welfare of their membership.”¹⁸ This is a critical time for Tribal Nations to update and make comprehensive their communications priorities and goals. Tribal governments should consider all community needs that would be supported by communications services. These might include, but are not limited to, anchor institutions, economic development, education, healthcare, and public safety. Each Tribal Nation has unique elements to its communications needs and priorities, but effectively articulating those needs is a critical first step in addressing them.

12. As Tribal government administrations change and develop, this is an important opportunity to demonstrate, both to communications providers and to the Commission, their continuity in communications priorities and goals. Certain Tribal governments have created their own governmental

¹⁵ *Id.* Although our focus here is on providing guidance, the Commission thus will consider the need for further guidance, or to clarify the existing rules regarding Tribal engagement or pursue new rules with specific procedures, if warranted in the future based on actual experiences and outcomes resulting from this guidance.

¹⁶ *Id.* at n.1054.

¹⁷ For example, engagement may occur when necessary by phone or video conference where extreme weather conditions and/or extreme remoteness are present.

¹⁸ Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes. 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*).

offices and commissions to interact with the FCC and communications providers. Others have designated key members of their Tribal Councils to lead their communications prerogatives for their governments, in effect creating communications committees on their Councils. Other Tribes have yet to organize their governmental or administrative systems with respect to communications services. This engagement obligation necessitates a level of organization within the Tribal government that can convey both a high degree of certainty in the communications priorities of the Tribal Nation and maintain the continuity of those priorities to the greatest extent possible in a governmental environment that, by definition, changes over time. Updating Tribal communications priorities and goals, and ensuring the establishment of effective organizational structures concerning communications issues, are important first steps. However, ETCs must begin the Tribal engagement process this year to be able to report on meaningful engagement by July 1, 2013.¹⁹ Therefore, Tribal governments may need to take interim measures in the short term as they consider establishing new or modified communications goals and priorities.

13. Tribal Nations also should immediately begin preparations to receive, record, and process this engagement dialogue and any related correspondence. Specific efforts should be made to chronicle details of engagement dialogue sessions. Recordkeeping should be established for documentation of the initial contact, any follow-up communications, and the resulting annual certification documentation. Records should include, for example, a summary of all verbal interactions as well as copies of all electronic and hard copy communications.²⁰

14. Similarly, communications providers should take immediate steps to prepare for and initiate engagement with the Tribal governments whose lands they serve. Certifications articulating the steps taken to comply with the annual Tribal engagement obligation in 2012 are due on July 1, 2013 and each year thereafter.²¹ That is, the Tribal engagement obligation must be fulfilled by the end of each calendar year. Communications providers should, for example, take immediate steps to establish a lead and/or a team within their companies and to identify the appropriate Tribal government leaders with whom they will initiate the engagement process. The National Congress of American Indians (NCAI)²² maintains a routinely updated and comprehensive directory of American Indian Tribal and Alaska Native Village government leaders, addresses, and telephone numbers. The NCAI Tribal directory can be sorted by geographical area and can be found at <http://www.ncai.org/tribal-directory>.²³ Where needed, ONAP also will serve as a resource for communications providers and Tribal governments.

15. In addition, communications providers should retain copies of all communications with Tribal leaders they would need in order to demonstrate compliance with their annual certification requirement. In the event that a Tribal government does not respond to repeated efforts to engage, the provider should document all attempts at engagement and certify to that effect. As with the entire engagement process, reasonableness should prevail. As a general matter, we expect that a provider would not be penalized for a failure to respond on the part of a Tribal Nation, if the provider can demonstrate repeated good faith efforts to meaningfully engage with the Tribal government.

¹⁹ See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Third Order on Reconsideration, FCC 12-52 at para. 10 (rel. May 14, 2012) (*Third Reconsideration Order*) (changing the filing deadline from April 1 to July 1).

²⁰ For example, all ETCs receiving high-cost are now subject to a 10-year document retention requirement. See *USF/ICC Transformation Order*, 26 FCC Rcd at 17864, para. 620. See also *Third Reconsideration Order*, FCC 12-52 at para. 14.

²¹ See *Third Reconsideration Order*, FCC 12-52 at para. 10. See also 47 C.F.R. §§ 54.313, 54.1009.

²² NCAI is the nation's oldest, largest, and most representative inter-Tribal government and communities organization, representing American Indian Tribes and Alaska Native Villages.

²³ For a listing of all federally recognized American Indian Tribes and Alaska Native Villages, see www.bia.gov/cs/groups/xoia/documents/document/idc012038.pdf. ONAP, in coordination with the Bureaus, will endeavor to provide additional resources to Tribal governments and carriers to help facilitate this engagement, including the possibility of using the Commission's website as a repository of information.

B. Needs Assessment and Deployment Planning

16. Tribal governments play a vital role in identifying and serving the needs and interests of their local communities, often in remote, insular, cyclically impoverished communities with a historic lack of critical infrastructure. Tribal government leaders are intimately acquainted with their members' needs and have valuable insight into how to meet them. "Tribal-centric" business models – those that actively engage the Tribe, its core community institutions, and members in deployment and adoption planning – have a greater chance of establishing sustainable services on Tribal lands.²⁴ Communications providers also have experience and a valuable perspective on the challenges, economics, and other realities of providing service to remote, low-income, and underserved regions of the country, including certain Tribal lands.

17. The Tribal engagement obligation provides Tribal governments and communications providers alike with a new opportunity – the opportunity to have a genuine conversation about communications needs and deployment planning on Tribal lands. When telephone service was originally deployed, there was no such obligation and, as a result, in many instances, Tribal needs and carrier deployment efforts were not aligned. The Tribal engagement obligation affords both Tribal governments and communications providers the opportunity to move forward with a shared vision. This will only occur, however, if Tribal governments and communications providers alike take advantage of this historic opportunity to improve the communications landscape on Tribal lands.

18. To that end, Tribal governments should come to the table with a serious, well-thought out assessment of the Tribes' communications needs. Issues that Tribal governments should consider include, for example, the Tribe's communications goals, needs, and priorities, as well as what the Tribe intends to do with communications services (e.g., provide connectivity to those living on Tribal lands, encourage economic opportunity). Tribal governments should also assess what core community or anchor institutions are central to deployment, and what in the nature and operations of these institutions is relevant to the need for communications services. In addition, Tribal governments should consider whether there are economic factors and possibly Tribally-driven opportunities that will assist in making the business case for deployment on Tribal lands, as well as opportunities where Tribal governments and communications providers can partner. In analyzing and discussing communications goals, needs, and priorities, Tribal governments should note that recipients of Connect America Fund (CAF) support, including the Mobility Fund, are subject to public interest obligations, as established in the *USF/ICC Transformation Order*.²⁵

19. Similarly, communications providers should come to the table ready to articulate their deployment priorities, the process by which they arrived at these priorities, and their initial plans for deployment on Tribal lands. Issues that communications providers should be prepared to discuss include, for example, the services they currently deploy, and what services they intend to deploy, on Tribal lands. Providers should also be prepared to discuss their timelines for the provision of services not currently available on Tribal lands, as well as their priorities in terms of service and the factors that led them to prioritize deployment to particular areas. Communications providers should also identify any opportunities they envision to partner with Tribal governments.

C. Feasibility and Sustainability Planning

20. Feasibility and sustainability planning for communications services on Tribal lands presents issues of concern for both Tribal governments and communications providers. Tribal governments generally want services rapidly deployed for their members to support the economic, educational, public safety, and health care opportunities that communications services afford. Communications providers

²⁴ See *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672, 2679-80, para. 12 (2011) (*Native Nations NOI*).

²⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17691-17709, paras. 74-114.

generally want business models that will be practical in terms of build out, and viable in terms of revenue flow and quality of service. While some commonalities likely exist, we believe there are many differences from one provider to another and from one Tribal government to another. The Tribal engagement obligation affords both parties the opportunity to share specific perspectives and information and to begin charting a path forward to address feasibility and sustainability in coordination with one another.

21. Tribal lands nationwide face some of the greatest challenges to the feasibility and sustainability of a 21st century communications infrastructure, including rugged and remote terrain and often endemic levels of poverty. Therefore, communications build out plans based purely on population density or proximity to other robust networks can face major cost benefit analysis challenges. Tribal government leaders, who are largely responsible for managing a wide array of government services and economic opportunities for their communities, are uniquely situated to advise communications providers of the specific challenges associated with deploying and sustaining a communications network on their lands. The Tribal engagement obligation will facilitate discussion between Tribal government leaders and communications providers, affording providers an important opportunity to draw upon the knowledge gained to inform and coordinate their feasibility and sustainability planning.

22. Tribal Nations should be prepared to discuss any additional resources they may bring to bear in feasibility and sustainability planning for communications services, because many federal grant or loan programs provide direct access to, or particular standing for, Tribal Nations and their entities. That is, there are federal government programs that support infrastructure deployment and support the economic, health, safety, and welfare missions in Native communities—the very same priorities for the deployment of robust communications networks on Tribal lands. For example, Tribes may be considering business ventures that would benefit from coordination on communications planning at the outset. Together, providers and Tribal Nations have the opportunity to discuss how to coordinate in planning, providing, and meeting the expenses for communications services on Tribal lands.

23. When addressing the issues of sustainability on Tribal lands, one must also calibrate expectations and develop an awareness of the unique nature of Tribal communities. Issues such as cyclical poverty, remoteness, and deployment priorities all inform the potential sustainability and ultimate profitability of a particular communications model on Tribal lands. That is, it can take a longer period of time to develop a sustainable enterprise on many Tribal lands. Increased coordination between Tribal governments and communications providers on specific elements of feasibility will heighten the chances of ultimate sustainability for communications business models on Tribal lands.

D. Marketing Services in a Culturally Sensitive Manner

24. As noted above, for the purposes of the USF/ICC proceeding and, therefore, the Tribal engagement obligation, Tribal lands are comprised of the lands of the approximately 566 federally recognized American Indian Tribes and Alaska Native Villages, as well as Hawaiian Home Lands.²⁶ Tribal lands represent a rich and diverse array of cultural heritage, history, practices, and pride. Outside the context of Tribally owned and operated providers, however, seldom have these cultural factors been fully considered in the marketing and deployment of communications services on Tribal lands. The Tribal engagement obligation provides Tribal governments and communications providers with the opportunity to discuss and explore ways in which they can coordinate or partner to ensure that services are marketed in a manner that will relate directly to the community, resonate with consumers, and stimulate increased adoption of services on Tribal lands.

25. Issues that Tribal governments and communications providers may wish to discuss include the tailoring of service offerings to the community through, for example, the feasibility of a local presence in the community. For example, locating a retail presence within a Tribal community and employing

²⁶ See *supra* n.2.

members of that community may increase awareness of and sensitivity to local cultural and communications needs. Providers and Tribal governments also may wish to discuss whether developing materials, separately or jointly, specific to the Tribal community would be beneficial to either the provider or consumers on Tribal lands. In addition, providers and Tribal governments also may wish to discuss what other elements of their respective organizations may need to be engaged. For Tribal governments, this may mean administrative planning, community service, and other governmental offices. For providers, this may mean customer service, technical assistance, and commercial business divisions. Through a heightened mutual understanding of one another's needs, we anticipate that Tribal governments and communications providers may discover opportunities for working together that will yield benefits to all. Studies indicate that these efforts present genuine opportunities for success, because where Native Nations and their community members have access to broadband, their rates of Internet use are on par with, if not higher than, national averages.²⁷

E. Rights of Way and Other Permitting and Review Processes

26. There are numerous regulatory processes with which service providers must comply in order to provide communications services on Tribal lands, including rights of way, land use permitting, facilities siting, and environmental and cultural review processes.²⁸ Certain of these processes involve other federal agencies, such as the Department of Interior's Bureau of Indian Affairs (BIA), and failure to comply with these processes may result in a finding of trespass. Given the widely varying circumstances on different Tribal lands, a one size fits all approach is not appropriate here. Instead, in the context of the Tribal engagement obligation, the common goal for Tribal governments and communications providers should be one of greater mutual understanding about the relevant rights of way and other permitting and review processes on Tribal lands and a plan for informing communications providers of procedures in a helpful and instructive manner, designed to bring companies into compliance, where applicable.

27. To that end, Tribal governments and communications providers should come to the table prepared to discuss the relevant rights of way and other permitting and review processes, as well as the challenges associated with these processes. For example, with respect to the BIA's appraisal process for rights of way, dialogue that prioritizes early notification might expedite Tribal governments' consultations with BIA and consent.²⁹ Tribal governments should have a comprehensive list of all processes with which communications providers serving their Tribal lands are required to comply, such as rights of way, land use permitting, facilities siting, and environmental and cultural review processes. Communications providers should have documentation of any and all processes with which they currently comply. All of this information will provide the foundation for a substantive discussion of all requirements and steps for moving forward together.

F. Compliance with Tribal Business and Licensing Requirements

28. As sovereign institutions, Tribal governments have the authority to impose Tribal business and licensing requirements on all entities doing business on their lands. While the type and form of requirements may vary greatly from one Tribal land to another, Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services, to the Tribe, Tribal members, or Tribal lands. The form of these licenses vary greatly, including certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government

²⁷ See Traci L. Morris Ph.D., Native Public Media and Sascha D. Meinrath, New America Foundation, *NEW MEDIA, TECHNOLOGY AND INDIAN USE IN INDIAN COUNTRY: QUANTITATIVE AND QUALITATIVE ANALYSES* (Nov. 19, 2009) (*NPM/NAF New Media Study*).

²⁸ See *USF/ICC Transformation Order*, 26 FCC Red at 17868-69, para. 637.

²⁹ See generally 25 C.F.R. Part 169 – Rights-of-Way Over Indian Lands.

licensure.³⁰

29. As part of the Tribal engagement obligation, Tribal governments and communications providers should come to the table prepared to discuss in detail the relevant Tribal business and licensing requirements. Tribal governments should have a comprehensive list of any such requirements applicable to the provision of communications services. They should be prepared to provide an explanation of precisely what all such requirements entail, including specific application procedures and timeframes, as well as the governmental offices involved in the licensing process. Communications providers should be prepared to provide evidence of compliance with any Tribal business practice licenses with which they currently comply for that Tribe. Consistent with the discussion above regarding rights of way and other permitting and review processes, the common goal here should be one of greater mutual understanding about the relevant Tribal business licensing requirements and a plan for bringing companies into compliance, where applicable.

IV. CONCLUSION

30. In conclusion, the Tribal engagement obligation represents an opportunity for Tribal governments and communications providers to coordinate on many issues critical to the deployment and adoption of communications technologies on Tribal lands. As discussed in the introduction, this guidance represents the first step in an iterative process. That is, this guidance will evolve over time based on initial experiences and feedback from Tribal governments and communications providers. In an effort to identify commonalities, increase efficiencies, and build upon current working relationships, ONAP will engage all regional stakeholders, as appropriate, and will respond to needs articulated by communications providers and Tribal governments.

V. CONTACTS

31. For further information concerning this guidance, contact the offices listed below:

Office of Native Affairs and Policy
Geoffrey Blackwell at (202) 418-3629
Irene Flannery at (202) 418-1307

Wireless Telecommunications Bureau
Sue McNeil at (202) 418-7619

Wireline Competition Bureau
Joseph Cavender at (202) 418-1548

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³⁰ See *USF-JCC Transformation Order*, 26 FCC Rcd at 17868-69, para. 637, n.1052.



PUBLIC NOTICE

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WIRELINE COMPETITION BUREAU SEEKS FURTHER COMMENT ON ISSUES IN THE RURAL HEALTH CARE REFORM PROCEEDING

WC Docket No. 02-60

Comment Date: August 23, 2012
Reply Comment Date: September 7, 2012

1. In this Public Notice, the Wireline Competition Bureau seeks to develop a more robust record in the pending Rural Health Care reform rulemaking proceeding, particularly with regard to the proposed Broadband Services Program.¹ The Commission's Rural Health Care Pilot Program has helped foster the creation and growth of numerous state and regional broadband networks of health care providers (HCPs) throughout the country.² These Pilot project networks have enabled health care providers in rural areas to tap into the medical and technical expertise of other health care providers on their networks, using telemedicine and other telehealth applications to improve the quality and lower the cost of health care for their patients in rural areas.³ As the Commission moves forward with reform of the Rural Health Care (RHC) program, it can benefit greatly from the experience of the Pilot projects and the lessons learned in the Pilot Program. A more focused and comprehensive record will help the Commission craft an efficient permanent program that will help health care providers exploit the potential of broadband to make health care better, more widely available, and less expensive for patients in rural areas.

2. In its March 16, 2010, Joint Statement on Broadband, the Commission said that "ubiquitous and affordable broadband can unlock vast new opportunities for Americans, in communities large and small, with respect to . . . health care delivery."⁴ The *National Broadband Plan* issued that same day

¹ *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Notice of Proposed Rulemaking, 25 FCC Rcd 9371, 9407-9415, paras. 90-113 (2010) (*NPRM*).

² See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 21 FCC Rcd 1111 (2006) (*2006 Pilot Program Order*); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 22 FCC Rcd 20360 (2007) (*2007 Pilot Program Selection Order*).

³ See, e.g., USAC Apr. 27 Site Visit Reports; USAC Mar. 16 Site Visit Reports. A list of recent *ex parte* filings and associated short cites used throughout this Public Notice is attached in the Appendix.

⁴ *Joint Statement on Broadband*, GN Docket No. 10-66, FCC 10-42, para. 3 (rel. Mar. 16, 2010).

recommended, among other things, that the Commission reform its Rural Health Care program in two ways: (1) by replacing the existing Internet Access Fund with a Health Care Broadband Access Fund, and (2) by establishing a Health Care Broadband Infrastructure Fund to subsidize network deployment for HCPs where existing networks are insufficient.⁵ Later that year, the Commission issued a Notice of Proposed Rulemaking in this docket proposing, consistent with the National Broadband Plan recommendations, both a Health Infrastructure Program, which would support the construction of new broadband HCP networks in areas of the country where broadband is unavailable or insufficient, and a Health Broadband Services Program, which would support the monthly recurring costs of broadband services for rural HCPs.⁶

3. Since the Commission issued the *NPRM* in 2010, the rural health care Pilot projects have made additional progress toward full implementation of their health care broadband networks.⁷ Although the Commission allowed Pilot projects to receive support to construct and own broadband network facilities, many Pilot projects chose to lease broadband services from commercial service providers as a way to implement broadband networks connecting HCPs.⁸ Projects chose to lease services instead of building networks because HCPs did not want to own or manage the networks and could more easily obtain needed broadband without owning the facilities or incurring administrative and other costs associated with network ownership. In light of the number of successful projects that elected to lease services instead of constructing networks, this Public Notice focuses on deepening the record regarding the Commission's proposed Broadband Services Program and the participation by consortia, including Pilot projects, in such a program.

4. In recent months, Commission staff has engaged in outreach calls and meetings with many Pilot projects, as well as with other entities knowledgeable about rural health care, telemedicine, and Health IT.⁹ Based on what we have learned from the Pilot projects, and in light of the comments and other information filed in this Docket, we have identified several areas relating to the Broadband Services Program proposed in the *NPRM* that would benefit from further development of the record: (1) use of consortium applications; (2) inclusion of urban health care providers in funded consortia; (3) services and equipment to be supported; (4) use of competitive bidding processes and multi-year contracts; and (5) broadband needs of rural health care providers. We are especially interested in obtaining input that reflects the experience of participants in the Commission's current Rural Health Care programs, particularly that of the Pilot Program participants. To the extent possible, parties should identify

⁵ Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 215-16 (rel. March 16, 2010) (*National Broadband Plan*).

⁶ See *NPRM*, 25 FCC Rcd at 9373, para. 3.

⁷ The Commission recently issued an order maintaining support on a transitional basis for those Pilot project health care provider sites that will exhaust their Pilot funds before the end of the coming funding year (before June 30, 2013), while the Commission considers potential reforms that would enable Pilot recipients to transition to a permanent support mechanism. *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, FCC 12-74 (rel. July 6, 2012).

⁸ See *infra* para. 9 and note 32.

⁹ See Appendix. As defined in the *National Broadband Plan*, Health IT includes "information-driven health practices and the technologies that enable them" such as "billing and scheduling systems, e-care, EHRs [electronic health records], telehealth and mobile health." *National Broadband Plan* at 200.

throughout their comments the particular Public Notice questions to which they are responding, by using the relevant section numbers and letters (for example, "Section I.a. -- Consortium application process").

I. CONSORTIA

5. Section 254(h)(7)(B)(vii) of the Communications Act specifically authorizes funding for consortia of eligible health care providers.¹⁰ Commenters suggest that the consortium approach has many benefits, especially for rural HCPs that have limited administrative, financial, and technical resources.¹¹ Although a health care provider may apply for funding under the existing Rural Health Care telecommunications program or Internet access program (collectively, "Primary Program") as a member of a consortium, in practice consortium applicants in the Primary Program must still file a separate form for every HCP site, and thus the consortium process has not been as widely used in that program as it has in the Pilot Program.¹²

6. In the *NPRM*, the Commission recognized that many Pilot projects, which are consortia of HCPs, may wish to transition to the permanent Broadband Services Program, if adopted, and sought

¹⁰ 47 U.S.C. § 254(h)(7)(B)(vii).

¹¹ See USAC Observations Letter at 2-4 (discussing benefits of the consortium approach); Comments of Virginia Telehealth Network, WC Docket No. 02-60, at 34-35 (filed Sept. 8, 2010) (VTN Comments) (recommending that the Commission consider the use of a consortium application, by which a single party could apply for and receive funding on behalf of a group of eligible entities and then administer that funding for their benefit); Comments of Internet2 Ad Hoc Health Group, WC Docket No. 02-60, at 20 (filed Sept. 8, 2010) (Internet2 Comments) (stating that Pilot program participants, including consortia, should be allowed to transition to the Broadband Services Program); PSPN Feb. 23 *Ex Parte* Letter at 2 (stating that individual HCPs often do not have the capacity to negotiate the processes of the RHC program and that the ability to bill as a consortium is more efficient than requiring hundreds of members to submit invoices each month); Colorado Feb. 28 *Ex Parte* Letter at 1-2 (stating that the joint purchasing power of a consortium has led to a cost-effective contract and financial benefits to member HCPs, and that the consortium mechanism has increased Colorado's participation in the RHC program from 10 to 15 participants in the Primary Program to over 200 participants in the Pilot Program); Pilot Conference Call Mar. 13 *Ex Parte* Letter (PMHA *et al.*) at 3 (noting the view of five Pilot projects that a reformed RHC program should provide opportunities for networks to file as consortia, which takes the administrative burden off of small HCPs that do not have the time or personnel to apply for funds through the RHC program, and that the ability to bill service providers as a consortium in the Pilot Program was very helpful); Pilot Conference Call Mar. 26 *Ex Parte* Letter (AEN *et al.*) at 4 (noting the view of six Pilot projects that the consortium-based approach in the Pilot Program is much easier than the process in the Primary Program).

¹² The Commission's traditional rural health care programs (the telecommunications program and the Internet access program) are together commonly referred to as the "Primary Program." The telecommunications program ensures that rural HCPs pay no more than their urban counterparts for their telecommunications needs in the provision of health care services. See 47 U.S.C. § 254(h)(1)(A); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9093-9161, paras. 608-749 (1997) (*Universal Service First Report and Order*); 47 C.F.R. Part 54, Subpart G. The Internet access program provides a 25 percent discount off the cost of monthly Internet access for eligible rural HCPs. See 47 C.F.R. § 54.621; *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 24546, 24557, para. 22 (2003) (*2003 Order and Further Notice*).

comment on that transition.¹³ We now seek to further develop the record on issues relating to the use of consortium applications in the proposed Broadband Services Program:

- a. Consortium application process. We seek comment on specific procedures for the application process for consortia in the proposed Broadband Services Program and ask commenters to focus on how to streamline the application process while protecting against waste, fraud and abuse. What specific information should the Commission require from the consortium leader regarding each consortium member on the application forms? Should letters of authorization (LOAs) from participating members of the consortium be required? If so, should LOAs be submitted at the request-for-funding-commitment stage (with the filing of the Form 466-A), rather than at the request-for-services stage (with the filing of the Form 465), as is now the case under the Pilot Program? Submitting the LOAs later in the process, with the Form 466-A, would appear to be more administratively efficient for the consortium, because the consortium could wait until it had completed competitive bidding and knew the pricing before soliciting the LOAs. Before they know the pricing, health care providers are likely to be less certain about whether they will want to participate. This approach also would be administratively simpler for USAC, as USAC would only have to confirm eligibility for that smaller group of HCPs that already know the pricing and are therefore more sure that they want to participate. We also seek comment on the alternative of requiring HCP LOAs to be submitted at the earlier (Form 465) stage, as in the Pilot Program. Should the Commission require consortium applicants to provide details in the consortium's request for services (the Form 465) regarding the services to be purchased, such as the desired bandwidth, sites to be served, and general type of service, as is currently required in the Pilot Program? Should the Commission require the lead entity and selected vendor to certify that the support provided will be used only for eligible purposes, as it does in the Pilot Program in connection with Form 466-A? Should the Commission require applicants to submit a "declaration of assistance," as is required with the Form 465 in the Pilot Program? We encourage commenters to draw on their experience with the Pilot and Primary programs in supporting any recommendations for streamlined application procedures.
- b. Post-award reporting requirements. What is the least burdensome way to collect information necessary to evaluate compliance with the statute and other relevant regulations, and to monitor how funding is being used? Should the Commission require consortium applicants to submit Quarterly Reports, as in the Pilot Program?¹⁴ Would the same information that is required for single HCP applicants be required for each HCP in a consortium application, or should the Commission permit consortium applicants to submit a reduced amount of information for each HCP, as it did in the Pilot Program? We encourage commenters to draw on their experience with the Pilot and Primary Program in supporting any recommendations for streamlined reporting procedures.
- c. Site and service substitution. The Pilot Program permits site and service substitutions within a project in certain specified circumstances, in order to provide some amount of flexibility to project participants. Under the Pilot Program, a site or service substitution

¹³ *NPRM*, 25 FCC Rcd at 9415, para. 113.

¹⁴ See *2007 Pilot Program Selection Order*, 22 FCC Rcd at 20423-24, paras. 126-127.

may be approved if (i) the substitution is determined to be provided for in the contract, be within the change clause, or constitute a minor modification, (ii) the site is an eligible health care provider or the service is an eligible service under the Pilot Program, (iii) the substitution does not violate any contract provision or state or local procurement laws, and (iv) the requested change is within the scope of the controlling FCC Form 465, including any applicable Request for Proposal.¹⁵ Should the Commission adopt a similar policy for consortia that participate in the Broadband Services Program, if adopted? Would any modifications to that policy be warranted for the Broadband Services Program?

II. INCLUSION OF URBAN SITES IN CONSORTIA

7. One of the benefits of facilitating the establishment and operation of health care networks that serve providers in rural America is improved access to specialized care that typically is more available in urban areas. Historically, support under the Primary Program has only been provided to health care providers that meet the rural health care mechanism's definition of "rural."¹⁶ In the Pilot Program, however, the Commission permitted non-rural health care providers to participate as part of consortia that include health care providers serving rural areas.¹⁷

8. In response to the *NPRM*, a number of commenters and USAC identify many benefits from including public and not-for-profit urban (or "non-rural") health care providers in rural broadband health care networks.¹⁸ Urban providers have taken the lead in many of the Pilot projects, and commenters note

¹⁵ USAC Site and Service Substitution Policy, at 1, 3, available at <http://www.universalservice.org/res/documents/rhc-pilot-program.pdf/Site-and-Service-Substitution.pdf> (last visited June 29, 2012); see also *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket No. 96-45 et al., Fourth Order on Reconsideration & Report and Order, 13 FCC Red 5318, 5448-51, paras. 224-229 (1997) (*Universal Service Fourth Order on Reconsideration*) (outlining the circumstances under which rural health care program participants can make modifications to a contract that USAC has previously approved for funding without completing an additional competitive bidding process).

¹⁶ Whether an HCP is "rural" depends on where it is located in relationship to any Core Based Statistical Area (CBSA). An area located outside of any CBSA is rural. However, an area within a CBSA can be rural, depending on the characteristics of the particular census tract. See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Red 24613, 24619, para. 9 (2004) (*Second Report and Order and Further Notice*).

¹⁷ *2006 Pilot Program Order*, 21 FCC Red at 11111, 11114, paras. 3, 10. The Pilot Program was established under section 254(h)(2)(A) of the Act, which provides the Commission broad discretionary authority to provide universal service support for "advanced services" for all health care providers. See 47 U.S.C. § 254(h)(2)(A) ("The Commission shall establish competitively neutral rules to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit . . . health care providers . . ."); *Texas Office of Public Utility Counsel v. FCC*, 18 F.3d 393, 446 (5th Cir. 1999) (concluding that "the language in § 254(h)(2)(A) demonstrates Congress's intent to authorize expanding support to 'advanced services,' when possible, for non-rural health providers").

¹⁸ USAC Observations Letter at 4-5 (stating that urban participation in Pilot projects was beneficial from a network design perspective, provided necessary leadership to bring disparate stakeholders together, provided IT expertise and (continued...))

that many urban HCPs also provide technical, financial, and administrative support that otherwise might be unavailable to rural HCPs.¹⁹ Commenters have also noted that urban locations typically have medical specialists and other resources that rural HCPs need to access, through telemedicine and other telehealth applications.²⁰ To further develop the record in the rulemaking docket, we now seek more focused comment on issues relating to the participation of urban HCPs in consortia that serve rural health care needs as part of the Broadband Services Program, if adopted.

- a. Proportion of urban or rural sites in consortia. The 2007 Pilot Program Selection Order allowed urban HCPs to receive support under the Pilot Program as long as they were part of networks that had more than a *de minimis* number of rural HCPs on the network.²¹ If the Commission were to provide support for broadband services to urban HCPs that are members of consortia that serve rural areas, should it adopt specific rules to ensure that the major benefit of the program flows to rural HCPs and/or to rural patients? For example, should the Commission require that more than a *de minimis* number of rural HCPs be included in such consortia, as in the Pilot program, and if so, what specific metrics should be used to determine whether a sufficient number of rural

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technology to rural HCPs, and facilitated access for rural patients to health care specialists in urban areas); Comments of the Nebraska Statewide Telehealth Network, WC Docket No. 02-60, at 5 (filed Sept. 8, 2010) (stating that specialty urban providers serve not only as rural health safety nets through provision of health care, but also provide leadership in collaborative ventures, education, training, and information technology support to small rural health facilities and practitioners) (NSTN Comments); Colorado Feb. 28 *Ex Parte* Letter at 2 (stating that Colorado has created a 60 percent rural, 40 percent urban statewide health care network that “undergirds, complements, and strengthens the existing and necessary urban/rural interdependencies,” and stating that supporting only rural sites fails to recognize the reality of urban/rural interdependencies). Consistent with previous uses, we use the term “urban” to mean “non-rural.” See 2007 Pilot Program Selection Order, 22 FCC Red at 20421, para. 120.

¹⁹ See *supra* note 18; see also Pilot Conference Call Mar. 13 *Ex Parte* Letter (PMHA *et al.*) at 2-3 (group of five Pilot projects stating that urban HCP participation is “the key to the networks’ success;” that rural HCPs value their connection to urban hospitals and their instant access to specialized care; that urban HCPs have provided technical support to rural HCPs and trained some of their IT staff, which has led to an improved rural HCP workforce; and that many rural HCPs rely on urban sites in their network to pay for their networks’ administrative expenses).

²⁰ See *supra* note 18; see also Comments of the New England Telehealth Consortium, WC Docket No. 02-60, at 3 (filed Sept. 7, 2010) (stating that the majority of its sites are rural, but need to be connected to urban hospitals for access to telemedicine, clinical specialists, and PACS systems) (NETC Comments); Internet2 Comments at 18 (noting that in North Carolina, many non-rural sites serve rural populations and tertiary facilities in metropolitan areas often provide critical specialty services to rural populations); OHN Feb. 28 *Ex Parte* Letter at 6-7 (stating that the subsidy for urban providers is critical to supporting integrated health care delivery, that rural/frontier providers are looking for improved access to urban specialists and resources to augment their dwindling clinical and operational resources, and that without the urban centers of excellence being on and actively using the network connection, there would be no value to the rural/frontier providers in connecting); Pilot Conference Call Mar. 26 *Ex Parte* Letter (AEN *et al.*) at 1 (explaining that the inclusion of urban sites in the Pilot Program was critical to providing specialty care, because of the shortage of specialists in rural areas).

²¹ 2007 Pilot Program Selection Order, 22 FCC Red at 20834-5, para. 50.

HCPs are participating in the consortia?²² For instance, should the Commission specify a maximum percentage of urban sites within a consortium? USAC states that urban sites make up approximately 35 percent of all HCP Pilot Program sites that received funding commitments as of January 2012.²³ Should the Commission adopt this or a different percentage as an upper limit on the proportion of urban HCP sites within the rural health care program overall or within a consortium?

- b. Limiting percentage of funding available to urban sites. In the alternative, should the Commission specify a maximum amount of funding that can be provided to urban sites within a consortium? USAC estimates that about 35 percent of committed funds have gone to urban HCPs in the Pilot Program (while noting that this figure probably overstates the true urban share).²⁴ Given that the Commission has sought comment on how to transition Pilot Program participants into a reformed program, would adopting a requirement that urban sites receive no greater than 35 percent of total funds per funding year be a workable and appropriate restriction? How would the existence of such limits on urban site funding or inclusion of urban sites affect the consortium planning process and the development and growth of consortia over time?
- c. Impact on Fund. To the extent commenters support a particular approach to limiting the participation of urban sites in consortia serving rural areas, they also should estimate the likely impact on the RHC funding mechanism if the Commission were to adopt their recommended approach. Commenters should provide data to support their estimates. We welcome detailed analysis on the impact on the Fund of any limits (or lack thereof) on urban HCP participation that the Commission may adopt or that parties may propose.
- d. Impact on network design. USAC notes that in the hub-and-spoke configuration common to Pilot projects, where a centralized or primary HCP serves as the main provider and is surrounded by several subsidiary providers, the hub is often an urban HCP.²⁵ What impact would including (or excluding) urban sites from funding under the Broadband Services Program have on network design and efficiency, from both a cost perspective and a technological perspective? Would it be possible to limit funding for urban sites to recurring and non-recurring charges associated with equipment necessary to create hubs at urban HCP sites? Would such a limitation unnecessarily restrict participation by urban HCPs or otherwise limit the effectiveness of the program?
- e. Role of urban health care providers if not funded. There may be significant benefits to Pilot projects from having a project leader that handles administrative and other

²² See Comments of Rural Wisconsin Health Cooperative, WC Docket No. 02-60, at 3 (filed Sept. 8, 2010) (stating that non-rural providers should be funded, but Commission should include language that safeguards the program from turning into something that loses its rural provider focus).

²³ See USAC June 27 Data Letter at 1.

²⁴ See USAC May 30 Data Letter at 2-3; USAC May 4 Data Letter at 3.

²⁵ USAC Observations Letter at 5; see also NOSORH Mar. 28 *Ex Parte* Letter at 1 (stating that in Minnesota, urban hospitals are typically the hubs of health care networks, and more and more rural hospitals are joining as spoke sites to those hubs).

necessary tasks on behalf of the other project participants.²⁶ If the Commission were to exclude urban sites that are part of consortia serving rural communities from receiving funding under the Broadband Services Program, would there be administrative benefits to allowing such urban providers still to serve as project leaders even though they do not receive any support? In response to the *NPRM*, some commenters and Pilot projects contend that without support from the RHC program, urban sites may be reluctant to participate in broadband networks with rural HCPs, which could undermine the ability of rural HCPs to interconnect with those urban sites and to draw on their technical and medical expertise.²⁷ What incentives would urban providers have to participate as a project leader if they are unable to receive any support?

- f. Grandfathering of urban sites already participating in Pilot projects. If the Commission chooses not to provide funding to urban sites under the Broadband Services Program, or sets limits on such funding as discussed in paragraph (b) above, should the Commission nevertheless provide funding to urban sites that have received funding under existing Pilot projects?²⁸ Should the Commission limit the funding to existing Pilot project urban sites only for so long as the urban site is a member of a consortium with rural HCPs?

III. ELIGIBLE SERVICES AND EQUIPMENT

9. In the Pilot Program, the Commission allows health care providers to use “any currently available technology” in order to create networks.²⁹ The Pilot Program funds both recurring costs and non-recurring costs (NRCs) for dedicated broadband networks connecting HCPs in a state or region, including the cost of subscribing to commercial service providers’ services.³⁰ As noted above, although

²⁶ See USAC Observations Letter at 1, 4-5.

²⁷ See, e.g., NETC Comments at 3 (arguing that it is very important that urban hospitals receive a subsidy so that they are incented to be part of a network that is connected to rural sites); Pilot Conference Call Mar. 13 *Ex Parte* Letter (PMHA *et al.*) at 3 (summarizing call with five Pilot project representatives, who stated in relevant part that due to the current economic environment, budgets are tight for urban HCPs, and it may be difficult for urban HCPs to continue to provide support to rural HCPs in their networks if they are ineligible to receive RHC program funding themselves); PSPN Feb. 23 *Ex Parte* Letter at 1 (stating that urban hospitals, which serve as “consulting” sites for rural hospitals in telemedicine, are often as hard-pressed for available funding as the rural hospitals and cannot bear the non-discounted costs of participation in the networks, and without their participation, vital links in the chain of health care are missing).

²⁸ Approximately 730 sites that have received funding commitments in the Pilot Program are urban, as of January 2012, out of a total of approximately 2,100. See USAC June 27 Data Letter at 1.

²⁹ 2007 *Pilot Program Selection Order*, 22 FCC Rcd at 20421, para. 119.

³⁰ Eligible expenses under the Pilot Program include: (1) costs for deploying transmission facilities and providing access to advanced telecommunications and information services (including costs for design, engineering, materials and construction of fiber facilities or other broadband infrastructure; engineering, furnishing (*i.e.*, as delivered from the manufacturer), and installing network equipment; and operating and maintaining the constructed network); (2) costs of subscribing to carrier-provided transmission services to the extent that a participant chose to subscribe to such services in lieu of deploying its own broadband network; and (3) costs of network equipment that terminates a carrier’s or other provider’s transmission facility, routers/switches directly connected to either the facility or the (continued...)

the Pilot Program permitted projects to construct and own broadband network facilities, many projects elected to lease broadband services (which mostly involve recurring costs) rather than constructing and owning the broadband facilities themselves. As of February 29, 2012, the Pilot Program had committed approximately \$35 million for construction, \$162 million for leased/tariffed facilities or services, and \$19 million for network equipment (including engineering and installation).³¹ The projects choosing to lease services cite several reasons for that choice, including that the HCPs' core competencies does not include owning or managing communications networks, that the HCPs can obtain the needed broadband without owning the facilities themselves, and that the administrative and other costs associated with broadband network ownership are too great.³²

10. For the Broadband Services Program, the *NPRM* proposed to fund "recurring monthly costs for any advanced telecommunications and information services that provide point-to-point connectivity, including Dedicated Internet Access."³³ In light of the Pilot Program experience and the comments in the record, we seek more focused comment on questions related to this proposal.

- a. Point-to-point connectivity. Some commenters have raised concerns regarding the term "point-to-point" in the *NPRM*.³⁴ We seek to further develop the record on the types of connectivity that should be eligible for support under the proposed Broadband Services

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terminating equipment, and computers and related hardware used exclusively for network management. 2007 *Pilot Program Selection Order*, 22 FCC Rcd at 20397-8, paras. 74-75.

³¹ USAC Observations Letter at 7-8.

³² USAC Observations Letter at 7-8; OHN Feb. 28 *Ex Parte* Letter at 1 (stating that utilizing existing fiber infrastructure to create a leased line network imposed less administrative burden and overhead on Oregon Health Network versus owning the actual equipment and fiber connection); Pilot Conference Call Mar. 13 *Ex Parte* Letter (PMHA *et al.*) at 3 (group of Pilot projects stating that HCPs' core competencies do not include constructing and owning networks, and that they preferred to lease services, which allowed the projects to reach many more HCPs than the construction options); Pilot Conference Call Mar. 16 *Ex Parte* Letter (ARCHIE *et al.*) at 3 (stating that while the Pilot Program helped prompt the deployment of fiber or other high capacity facilities to many HCP sites where such facilities were not previously available, HCPs do not want to own the telecommunications network facilities); Pilot Conference Call Mar. 26 *Ex Parte* Letter (AEN *et al.*) at 2 (noting comment that most stakeholders prefer not to own the physical facilities comprising their network, but would rather defer to service providers that have experience and expertise in these matters to complete any build out, and stating that in cases where construction is necessary, the HCP may issue one RFP for construction and a second RFP for an experienced entity to manage the network on behalf of the HCP).

³³ *NPRM*, 25 FCC Rcd at 9408, para. 93.

³⁴ See, e.g., Internet2 Comments at 17 (noting that the term "point-to-point" is often used to refer to a connection that is restricted to two endpoints and with no data or packet formatting, and stating that health care organizations seeking modern, cost-effective telecommunications services should aim to employ an IP network); NETC Comments at 7 (recommending deletion of the term "point-to-point," noting that connecting the large number of sites in NETC back to a central location with point to point circuits is impractical, and stating that a cloud-based network is the more practical design); Comments of Alaska Communications Systems, WC Docket No. 02-60, at 2 (filed Sept. 8, 2010) (ACS Comments) (stating that RHC support should continue to be technologically neutral and not limited to conventional "dedicated" point-to-point network infrastructure, as cloud computing, Multi-Protocol Label Switching (MPLS) and Internet-based network designs can provide fast, secure, and reliable service to and among RHC providers at costs well below building separate terrestrial connections to each facility).

Program. Health care networks and other enterprise customers use a wide variety of connectivity solutions which allow a variety of topologies (ring, mesh, hub-and-spoke, line, etc.) and technologies (MetroE, MPLS, Virtual Private Network, etc.) to meet their requirements. These solutions are “point-to-point” in the sense that they allow a facility to send or receive data to or from another facility, but they also provide additional capabilities -- for example, the ability to connect to multiple facilities on the same network, and/or the ability to connect to another facility without needing a physically “dedicated” circuit to that facility. Should the definition of services to be funded under the Broadband Services Program omit the phrase “point-to-point”? We seek comment on whether the rules for the Broadband Services Program should enumerate a wide range of connectivity solutions such as those listed above, or should be more general, in recognition of the likely change and evolution of services utilized by health care providers that will occur over time. Should there be any distinction in the types of services that would be funded if the applicant is part of a consortium, as opposed to individual applicants?

- b. Eligible non-recurring costs (NRCs). For the Broadband Services Program, the Commission proposed in the *NPRM* to provide one-time support for 50 percent of reasonable and customary installation charges for broadband access and to provide support for the cost of leases of lit or dark fiber.³⁵ The American Telemedicine Association has recommended that the Commission, at a minimum, support the costs of routers and bridges associated with the installation of broadband services to an eligible health care provider, and that the Commission allow such providers to work together to purchase equipment through joint, cooperative bidding procedures in order to allow for more efficient purchasing of network equipment costs.³⁶ USAC notes that the availability of funding for certain types of equipment in the Pilot Program (“servers, routers, firewalls, and switches”) facilitates the ability of health care providers to upgrade circuits or create private networks.³⁷ We seek more focused comment on whether the NRCs eligible to receive support under the Broadband Services Program should include equipment to enable the formation of networks among consortium members, similar to the Pilot Program.³⁸
- c. Limited Funding for Construction of Facilities in Broadband Services Program. As noted above, many Pilot projects chose to lease services rather than to construct and own their own network facilities.³⁹ Some Pilot projects nevertheless argue that they need the option

³⁵ *NPRM*, 25 FCC Red at 9410-11, paras. 100-102.

³⁶ Comments of the American Telemedicine Association. WC Docket No. 02-60, at 6, n. 6 (filed Sept. 8, 2010) (ATA Comments). See also ACS Comments at 12-13 (recommending that the Commission support RHC providers’ one-time network design, customer premises equipment, and installation costs where necessary to maintain quality broadband service all the way to the rural delivery point of the data transmission).

³⁷ See USAC Observations Letter at 6-7 (noting that equipment leases and purchases are not eligible for funding in the Primary Program).

³⁸ For the Health Infrastructure Program, the Commission proposed to fund NRCs similar to those funded in the Pilot Program. *NPRM*, 25 FCC Red at 9386, para. 35.

³⁹ See *supra* note 32.

of constructing their own facilities when no service provider is willing to construct broadband facilities and lease them to project participants, or when the bids a project receives for leased services are higher than the cost of construction.⁴⁰ The *NPRM* proposed a Health Infrastructure Program that would fund the construction of dedicated broadband networks in areas where broadband is demonstrated to be unavailable, and would require HCPs to have an ownership interest in the network facilities funded by the program.⁴¹ The Broadband Services Program, in contrast, would provide funding only for broadband services and, as proposed, would not cover capital or infrastructure costs.⁴² We seek to further develop the record on whether it would be appropriate under the proposed Broadband Services Program, if adopted, to provide funding to recipients to construct and own network facilities under limited circumstances. Would it be appropriate, for instance, in a situation where the applicant could demonstrate that self-provisioning the last mile facility to connect to an existing health care network is more cost-effective than procuring that last mile connectivity from a commercial service provider? What requirements would need to be in place to ensure that construction and ownership is the most cost-effective option?⁴³ How would a health care provider or consortium make such a showing? Would it be necessary to wait until after the competitive bidding process is completed in order for an applicant to be able to make that showing?⁴⁴ Are there other more preliminary milestones during the competitive bidding

⁴⁰ See, e.g., Pilot Conference Call Mar. 26 *Ex Parte* Letter (WNYRAHEC *et al.*) at 1 (noting that having a private fiber network as part of the larger network helped St. Joseph's to control costs and ensure long-term success, as it could be cost-prohibitive to buy from a carrier the 1 to 10 Gbps connections needed to move medical images); Letter from David LaFuria, Counsel for Health Information Exchange of Montana, to Marlene H. Dortch, Secretary, WC Docket No. 02-60, at 2 (filed Sept. 22, 2011) (stating that HIEM's network would be a small fraction of what it is now if HIEM had simply leased facilities from the outset, and arguing that the Commission should retain the option for program participants to construct network facilities, as removing that option from competitive bidding will change how incumbent carriers approach the bid process); Pilot Conference Call Mar. 16 *Ex Parte* Letter (ARCHIE *et al.*) at 3 (stating that ownership of newly constructed facilities only makes economic sense where there are gaps in availability).

⁴¹ *NPRM*, 25 FCC Rcd at 9381-9383, 9395-9397, paras. 19-25, 55-59.

⁴² *Id.* at 9408, 9410-9411, paras. 93, 100-102.

⁴³ The Commission has defined "cost-effective" as "the method that costs the least after consideration of the features, quality of transmission, reliability, and other factors that the HCP deems relevant to . . . choosing a method of providing the required health care services." See 47 C.F.R. § 54.615(c)(7) (Primary Program); 2007 *Pilot Program Selection Order*, 22 FCC Rcd at 20400, para. 78 (Pilot Program). Unlike the Schools and Libraries universal service support mechanism (commonly referred to as the E-rate program), the RHC support mechanism does not require participants to consider price as the primary factor in selecting service providers. The Commission has explained that applicants to the RHC support mechanism are not be required to use the lowest-cost technology because factors other than cost, such a reliability and quality, may be relevant to fulfill their telemedicine needs. 2003 *Order and Further Notice*, 18 FCC Rcd at 24575-76, para. 58; 2007 *Pilot Program Selection Order*, 22 FCC Rcd at 20401, para. 79.

⁴⁴ See Reply Comments of the Brazos Valley Council of Governments, Health Information Exchange of Montana, New England Telehealth Consortium, Oregon Health Network, and Utah Telehealth Network, WC Docket No. 10-90 *et al.*, at 8-9 (filed May 23, 2011) (stating that "the best process for determining whether facilities capable of supporting medical broadband are, or are not available is a robust competitive bidding process through which HCPs (continued...)").

process after which an applicant could make a showing? If the Commission were to make this option available, should there be specific caps on funding available to construct HCP-owned facilities?

- d. Ineligible sites and treatment of shared services/costs. Section 254(h)(3) of the Act and Section 54.671(a) of the Commission's rules restrict the resale of any services purchased pursuant to the rural health care support mechanism.⁴⁵ In the Pilot Program, the Commission determined that, under this resale restriction, a selected participant could not sell network capacity that was supported by Pilot Program funding, but could share excess network capacity with an ineligible entity as long as the ineligible entity paid its "fair share" of network costs attributable to the portion of the network capacity used.⁴⁶ In the Pilot Program, projects have allocated the cost of shared services and equipment among members (both eligible and ineligible HCPs) by taking into account a variety of healthcare-specific factors. We note that in the Pilot Program, projects submit information about sharing of services and costs among members with their requests for funding commitments, and that USAC reviews and approves those submissions.

We seek comment on whether there is a need to adopt specific rules in the Broadband Services Program (if adopted), regarding the participation of ineligible HCP sites (*e.g.*, for-profit rural health clinics or, if not included in the Broadband Services Program, urban HCPs) in consortia that receive funding for broadband services provided to eligible members. Even if not funded, there may be other health care and financial reasons why providers that are not funded through the program may wish to enter into cooperative arrangements with other providers that are funded, in order to create local and regional health care networks. By acting together, providers are more likely to receive lower pricing and a wider array of services to meet their health care needs. Should the Broadband Services Program have a "fair share" requirement comparable to the Pilot Program? In particular, should the Commission adopt a specific approach to shared services and costs for consortium applicants, or should the Commission just require that the allocation of the costs of shared services and equipment among consortia members be reasonable? We welcome further comment on whether the procedures utilized by USAC to implement the fair share requirement in the Pilot Program are workable or burdensome, and what measures would best address potential waste, fraud and abuse in a reformed program.

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establish and post their required broadband service levels"); Letter from David LaFuria, Counsel for Health Information Exchange of Montana, to Marlene H. Dortch, Secretary, WC Docket No. 02-60, at 2, Att. at 13 (filed Mar. 29, 2011) (noting that HIEM's successful fiber deployments to date appear to have resulted in a greater number of competitively priced bids in subsequent deployments, and arguing that competitive bidding ensures that participants choose the most cost-effective bid, whether it be a lease or build option).

⁴⁵ 47 U.S.C. § 254(h)(3); 47 C.F.R. § 54.617(a).

⁴⁶ 2007 Pilot Program Selection Order, 22 FCC Rcd at 20416, para. 107.

IV. COMPETITIVE BIDDING PROCESS AND RELATED MATTERS

11. The Pilot Program requires projects to prepare Requests for Proposals (RFPs) and to use a competitive bidding process to select broadband infrastructure and service providers.⁴⁷ It appears that the competitive bidding process, in combination with bulk purchasing by a large number of health care providers using a single RFP, has led to lower prices, better service quality, and more broadband deployment than the individual HCPs might otherwise have obtained.⁴⁸ In the *NPRM*, the Commission proposed to extend the competitive bidding requirements currently applicable to the Primary Program's Internet access program to the Broadband Services Program, and sought comment on changes that could be made to make the competitive bidding mechanism more successful or efficient.⁴⁹ We now seek more focused comment on issues relating to the competitive bidding process.

- a. Competitive bidding process. Building on the experience gained from the Pilot Program, what specific requirements should be in place for competitive bidding in the Broadband Services Program, if adopted? Should the Commission require consortium applicants in the Broadband Services Program to prepare a Request for Proposal (RFP), as applicants in the Pilot Program were required to do? Should the Commission exempt consortia from the RFP requirement if they are applying for less than a specified amount of support (for example, if they are applying for less than \$100,000 in support)? Are there other elements of the competitive bidding process utilized in the Pilot Program that should be applied to the Broadband Services Program, either as is or with changes that the parties suggest to improve the process? Are there any competitive bidding requirements used in the Schools and Libraries Universal Service Support Mechanism that the Commission should apply to the Broadband Services Program, if adopted?⁵⁰
- b. Requirement to obtain competitive bids. Some commenters indicate individual rural HCPs may decide not to seek RHC support due to the added administrative burden associated with the competitive bidding process. The Virginia Telehealth Network (VTN) states that many rural HCPs are in areas served by a single broadband provider, where competitive options do not exist.⁵¹ Based on USAC's data, approximately 11 percent of RHC Primary Program applicants outside Alaska receive bids in the

⁴⁷ 2007 *Pilot Program Selection Order*, 22 FCC Rcd at 29412-15, para. 100-104.

⁴⁸ See USAC Observations Letter at 3; Colorado Feb. 28 *Ex Parte* Letter at 1 (stating that financial benefits have accrued to member HCPs from the joint purchasing power that led to a cost-effective contract with the telecommunications service provider); OHN Feb. 28 *Ex Parte* Letter at 1 (stating that OHN's multi-vendor leased line network framework helped utilize the existing state fiber infrastructure while creating the highest level of competition possible, allowing smaller local carriers to compete directly and fairly with larger providers, which subsequently resulted in OHN's members receiving the most competitive bids (reduced costs) possible); Pilot Conference Call Mar. 13 *Ex Parte* Letter (PMHA *et al.*) at 2 (stating that the benefits of pilot funding include the ability to obtain Internet services as a group); Pilot Conference Call Mar. 26 *Ex Parte* Letter (WNYRAHIEC *et al.*) at 2 (stating that WNYRAHIEC has experienced a great deal of cost savings from being on a shared network).

⁴⁹ *NPRM*, 25 FCC Rcd at 9414, para. 110.

⁵⁰ See 47 C.F.R. § 54.503.

⁵¹ VTN Comments at 33.

competitive bidding process.⁵² In response to the *NPRM*, VTN recommends that the Commission consider a streamlined service provider selection process for HCPs that do not have multiple broadband service options, such as simply requiring an HCP to submit a simple certification of its efforts to identify all broadband providers and a description of the broadband service option selected.⁵³ In the Broadband Services Program, should competitive bidding only be required for consortium applicants, given the experience to date with the current competitive bidding requirement for individual HCPs in the Primary Program?⁵⁴ We particularly seek comment on this question from HCPs who have experience with competitive bidding as individual HCPs in the Primary Program. Should the Commission consider not applying a competitive bidding requirement to individual applicants who request only a limited amount of funding? Are there any other applicants that the Commission should exempt from competitive bidding requirements under a Broadband Services Program, if adopted?

- c. Multi-year contracts. Participants in the Primary Program must submit funding requests annually, but may obtain “evergreen” status for certain multi-year contracts. Participants with evergreen contracts are not required to go through the competitive bidding process annually.⁵⁵ In contrast, Pilot Program participants were awarded a set maximum award for a multiple-year period and permitted to carry over unused funds from year to year during the duration of the award,⁵⁶ which has reduced the paperwork they needed to file and may have allowed them to lock in stable prices for several years.⁵⁷ Notably, a significant number of Pilot participants opted to make use of long-term prepaid leases

⁵² In the Primary Program, requests for bids are posted for single HCP sites, even when the HCPs are part of a consortium application. On average, from 2006 through 2010, approximately 24 percent of Alaska Primary Program applicants received competitive bids in comparison to approximately 11 percent of non-Alaska applicants. See USAC June 27 Data Letter at 2. As of January 2012, Alaska HCPs have received over half of the Primary Program funding, although they make up a far smaller proportion of the number of HCPs receiving support in the Primary Program. See USAC May 4 Data Letter at 2-3.

⁵³ VTN Comments at 34; see also ATA Comments at 8-9 (stating that the current application process has proven to be onerous to some rural health providers, and suggesting that the Commission explore a streamlined process that does not require local bids); Comments of the American Hospital Association, WC Docket No. 02-60, at 5 (filed Sept. 8, 2010) (AHA Comments) (stating that the competitive bidding requirement could become an unnecessary impediment to participation for smaller HCP in areas where the number of capable providers is low, and urging the Commission to streamline the competitive bidding process).

⁵⁴ See *NPRM*, 25 FCC Rcd at 9414, para. 110 (proposing to apply the competitive bidding requirements of the Internet Access Program to the Broadband Services Program).

⁵⁵ 47 C.F.R. § 54.623(d); see USAC Rural Health Care, Evergreen Contracts, <http://www.usac.org/rhc/health-care-providers/evergreen-contracts.aspx> (last visited June 29, 2012). Evergreen status does not extend to situations where a participant seeks to add services, make cardinal changes, renew or extend the contract. *Id.*

⁵⁶ 2007 Pilot Program Selection Order, 22 FCC Rcd at 20374, para. 35 & 20429-30, App. B; Letter from Dana R. Shaffer, Chief, WCB, to Scott Barash, Acting Chief Executive Officer, USAC (Jan. 17, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279603A1.pdf (instructing USAC to carry over any unused funds for a Pilot project in a funding year to the next funding year).

⁵⁷ USAC Observations Letter at 4.

and infeasible rights-of-use (IRU) arrangements.⁵⁸ For the Broadband Services Program, the Commission proposed to allow evergreen contracts, similar to those allowed in the Primary Program, and also to allow funding for the lease of lit or dark fiber, which is typically purchased under an IRU corresponding to the useful life of the fiber.⁵⁹

Commenters have suggested that the Commission could encourage high capacity broadband networks that would support health care providers' telemedicine and broadband needs by allowing HCPs to enter into long-term contracts for such networks with carriers or other telecommunications providers.⁶⁰ We seek comment on the benefits and drawbacks of providing funding for multi-year contracts, including long-term prepaid leases and IRUs, in the Broadband Services Program. The Nebraska Statewide Telehealth Network (NSTN) recommends that a "true" evergreen provision be applied to HCPs with multi-year contracts, which would allow for HCPs with multi-year contracts to apply only once for multiple years of funding.⁶¹

Would permitting evergreen contracts (as they are implemented today, with the annual filing requirement) be sufficient to allow consortia in the Broadband Services Program to reap the potential benefits of multi-year contracts, while minimizing administrative burdens? Or, would evergreen status need to be coupled with a multi-year award, and if so, would three years be sufficient for the term of the award, or would some other period be more appropriate?⁶² We note that long-term prepaid leases and IRUs generally involve a large, upfront payment. For example, the full cost for a dark fiber IRU is typically paid for in advance.⁶³ If the Commission permitted long-term prepaid leases and/or IRUs in the Broadband Services Program, how should it deal with upfront

⁵⁸ *Id.* at 7. An IRU is an infeasible right to use facilities for a certain period of time that is commensurate with the remaining useful life of the asset, generally 20 years. An IRU confers on the grantee the vestiges of ownership, and is customarily used in the telecommunications industry. It normally involves a substantial sum paid up front, generally priced as a certain amount (depending on market rates) per mile or per fiber mile. *See NPRM*, 25 FCC Rcd at 9395-96, para. 56.

⁵⁹ *Id.* at 9414-15, paras. 111-112; at 9411, para. 101; & at 9395 n. 116. For the Health Infrastructure Program, the Commission proposed to require participants to hold an ownership, IRU, or capital lease interest, and to prohibit short-term or operating leases in which the HCP has no ownership interest. *Id.* at 9395-96, paras. 55-58.

⁶⁰ *See, e.g.*, Comments of General Communication, Inc., WC Docket No. 02-60, at 15 (filed Sept. 8, 2010).

⁶¹ NSTN Comments at 6. *See also* AHA Comments at 5 (supporting proposal to allow providers to enter into multi-year contracts in order to avoid yearly reporting and re-bidding obligations).

⁶² ATA Comments at 9 (recommending "full" implementation of evergreen status, under which an HCP would only be required to re-file Form 467 (receipt of services) annually for a period of three years from the initial date of approval); NOSORH Mar. 28 *Ex Parte* Letter at 2 (noting National Organization of State Offices of Rural Health suggestion that the Commission consider a three-year period of eligibility for the Primary Program so that HCPs would not have to re-file each year, explaining that filing forms every year to receive support is burdensome for small HCPs and many recipients hire contractors to complete required paperwork).

⁶³ *NPRM*, 25 FCC Rcd at 9395 n. 116.

payments?⁶⁴ How would funding multi-year contracts impact the calculation and forecasting of demand for RHC support? What protections should be put in place to protect against waste, fraud and abuse? For instance, would the measures used in the Pilot Program for such arrangements be useful in the Broadband Services Program (such as sustainability plans, minimum contract length, and repayment requirements)? If so, should those same measures be used, or should they be modified in any respect?

- d. Existing Master Services Agreements (MSAs). MSAs permit applicants to opt into a contract for eligible services that have been negotiated by federal or state government entities without having to engage in negotiations with individual service providers. The U.S. Department of Health and Human Services has recommended that the Commission exempt from competitive bidding requirements federal health care providers (such as the Indian Health Service) that are required to use the General Services Administration Networkx contract for telecommunications services.⁶⁵ Should the Commission permit applicants for the Broadband Services Program to take services from an MSA, so long as the original master contract was awarded through a competitive process? What specific rules should be in place (e.g., an exception to the competitive bidding requirement) in order for HCPs to take advantage of MSAs? Should Pilot program participants that have exhausted Pilot program funding be able to obtain support from the Broadband Services program for services pursuant to MSAs that were negotiated by the Pilot projects?
- e. Eligible service providers. The *NPRM* proposed that broadband services supported by the Broadband Services Program may be provided by “a telecommunications carrier or other qualified broadband access service provider.”⁶⁶ In response to the *NPRM*, some Pilot participants expressed concern that this definition would be too narrow, as it might exclude some vendors that responded to RFPs issued by project participants.⁶⁷ In the Pilot Program, a wide range of service providers responded to the RFPs issued by the project participants, including telecommunications carriers and companies in the fields of systems integration, optical networking, utilities, construction, electronics and equipment.⁶⁸ We seek more focused comment on the specific definition that should be

⁶⁴ For the Health Infrastructure Program, the Commission proposed to support IRUs and to permit capital leases, but proposed to prohibit lease payments in advance of the lease term and proposed to prohibit operating leases in which the lessee has no ownership interest. For the Broadband Services Program, the Commission proposed to limit upfront support for non-recurring charges to \$500,000, and to require non-recurring charges of more than \$500,000 to be part of a multi-year contract and prorated over a period of at least five years. *Id.* at 9398, para. 63, 9411, para. 102.

⁶⁵ See Comments of the U.S. Department of Health and Human Services (HHS), WC Docket No. 02-60, at 3 (filed Sept. 10, 2010) (HHS Comments).

⁶⁶ *NPRM*, 25 FCC Rcd at 9443, App. A, para. 23 (proposed Section 54.635); see also *id.* at 9410, para. 98.

⁶⁷ See NCTN Comments at 2; CTN Comments at 23; Comments of the Illinois Rural HealthNet, WC Docket No. 02-60, at 15-16 (filed Sept. 1, 2010).

⁶⁸ See USAC May 4 Data Letter at App. C. See also *2007 Pilot Program Selection Order*, 22 FCC Rcd at 20417, para. 110 (waiving section 54.601(c) of the Commission’s rules to enable Pilot participants to receive support for not only telecommunications services and Internet access, but also funding of infrastructure deployment and network design studies).

adopted in our rules for eligible providers under the Broadband Services Program, if adopted.

V. BROADBAND NEEDS OF RURAL HEALTH CARE PROVIDERS

12. Both the *National Broadband Plan* and the *GAO Report* emphasized the importance of determining the broadband needs of health care providers as part of the Commission's reform of its rural health care program.⁶⁹ A number of parties have commented on the broadband needs of health care providers, and USAC has filed an informal needs assessment.⁷⁰ In light of developments since the issuance of the *NPRM*, we seek to refresh the record on various questions relating to the broadband needs of rural HCPs, with particular attention to how the answers may vary based on the size and type of HCP, and how the broadband needs may change over time.

- a. Telemedicine. What bandwidth is needed for various types of telemedicine applications? In particular, how widespread is the use of teleradiology, and what bandwidth is required? How widespread is the use of videoconferencing in providing telemedicine, and what bandwidth is required? Will broadband needs associated with telemedicine likely change over time? What factors will cause the needs to grow? How important are connections between rural HCPs and urban HCPs?
- b. Electronic health records. How will the current trend toward adoption and exchange of electronic health records affect bandwidth needs? Congress has directed the Medicare and Medicaid programs to provide incentive payments for HCPs that have adopted electronic health records and have achieved "meaningful use" of those records, which includes some electronic exchange of those health records.⁷¹ Eventually, achieving "meaningful use" is expected to be mandatory for recipients of Medicare and Medicaid payments. What is the impact of "meaningful use" incentive payments and requirements on likely demand for broadband connectivity for rural HCPs? What is the likely impact of participation by rural HCPs in Health Information Exchanges?
- c. Other telehealth applications. What are the likely broadband needs for other telehealth applications (e.g., training and technical support for health care purposes and health IT applications)?
- d. Service quality requirements. We also seek comment on the needs of rural HCPs for such service quality features as dedicated connections, redundancy, low latency, and lack

⁶⁹ *National Broadband Plan* at 209, 213; U.S. Gov't Accountability Office, FCC's Performance Management Weaknesses Could Jeopardize Proposed Reforms of the Rural Health Care Program, GAO 11-27, at 21-27 (Nov. 2010), available at <http://www.gao.gov/products/GAO-11-27> (*GAO Report*). See also *NPRM*, 25 FCC Red at 9413, para. 106 (noting dearth of information on broadband needs of HCPs).

⁷⁰ See, e.g., USAC Needs Assessment; NRHA Dec. 21 *Ex Parte* Letter; NRHRC Dec. 27 *Ex Parte* Letter; ONC Jan. 6 *Ex Parte* Letter; ONC Jan. 17 *Ex Parte* Letter; John Gale Mar. 29 *Ex Parte* Letter.

⁷¹ See HHS Comments at 2; Centers for Medicare and Medicaid, "EHR Incentive Programs," <https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html?redirect=/EHRIncentivePrograms/> (last visited June 29, 2012).

of jitter. How much will these added levels of quality add to the cost of broadband services for HCPs? Will privacy and security requirements applicable to health care data exchange affect HCP broadband service quality needs?

- e. Cost savings from broadband connectivity. In the *NPRM*, the Commission recognized that the use of broadband by health care providers has the potential to enable them not just to provide higher quality health care but also to realize substantial savings in the cost of providing health care.⁷² Many of the Pilot projects report that the broadband connectivity made possible by the program helped to generate such cost savings.⁷³ We solicit specific information regarding the nature and magnitude of cost savings that HCPs have been able to achieve through use of broadband, as well as information and data regarding potential for cost savings through telemedicine and other telehealth applications.⁷⁴ Many of these cost savings are realized by the HCPs themselves, through reductions in the number of and length of hospital stays, through savings in patient transport costs, through savings in transportation costs and time for medical professionals, and through other Health IT applications (such as consolidation of billing and scheduling functions, transmission and remote storage of images and medical records, and video-based training of health care and health IT professionals).⁷⁵ Some

⁷² *NPRM*, 25 FCC Red at 9372-9373, para. 2.

⁷³ For example, Heartland Unified Broadband Network (HUBNet) estimates that over a thirty-month period, eight hospitals in its network have saved a total of \$1.2 million in transfer expenses following the implementation of e-ICU services. USAC Mar. 16 Site Visit Reports at 7. Similarly, Pennsylvania Mountains Healthcare Resource Development Pilot believes that its network has enabled the development of a revenue cycle management program that has the potential to increase an HCP's bottom line by 2-3 percent, as well as reduce operating costs. *Id.* at 15. One project noted that linking to urban centers and using telemedicine "bends the cost curve." Pilot Conference Call Mar. 26 *Ex Parte* Letter (WNYRAHEC *et al.*) at 2-3.

⁷⁴ Telehealth is defined as the "electronic exchange of information—data, images and video—to aid in the practice of medicine, advanced analytics" and non-clinical practices such as continuing medical education and nursing call centers. It "encompasses technologies that enable video consultation, remote monitoring and image transmission ("store-and-forward") over fixed or mobile devices. *National Broadband Plan* at 200. Although related to telehealth, telemedicine is usually more narrowly defined. The Centers for Medicare and Medicaid Services (CMS) defines "telemedicine" as "two-way, real time interactive communication between the patient, and the physician or practitioner at the distant site to improve a patient's health." Centers for Medicare & Medicaid Services, <http://www.medicare.gov/Medicare-CHIP-Program-Information/By-Topics/Delivery-Systems/Telemedicine.html> (last visited June 29, 2012). The American Telemedicine Association defines "telemedicine" as "the use of medical information exchanged from one site to another via electronic communications to improve patients' health status." American Telemedicine Association, <http://www.americantelemed.org/i4a/pages/index.cfm?pageid=3333> (last visited June 5, 2012).

⁷⁵ See, e.g., USAC Apr. 27 Site Visit Reports at 3 (noting that Satilla Regional Medical Center in Georgia has been able to reduce patient lengths of stay with no denigration of care through its eICU program); USAC Mar. 16 Site Visit Reports at 9 (describing how Palmetto State Providers Network (PSPN) allows patients to receive psychiatric consults "at any time, with minimal wait" instead of waiting days in hospital's emergency rooms); Quarterly Report of Missouri Telehealth Network, WC Docket No. 02-60, at 5 (filed Jan. 31, 2012) (estimating that since telehealth implementation began, 706 transport trips have been avoided, resulting in annual savings of approximately \$60,000 for Missouri taxpayers); USAC Mar. 16 Site Visit Reports at 10 (explaining that the adoption PSPN's tele-OBGYN service allows physicians to utilize the entire day seeing patients, instead of spending the day driving to rural areas and only being able to see each patient for a few minutes).

commenters note that telemedicine also creates the potential for rural HCPs to increase revenues, because telemedicine can enable rural providers to treat more of their patients locally.⁷⁶ Telemedicine also yields costs savings for patients and their families, who can avoid the cost of travel and loss of workdays by receiving treatment closer to home.⁷⁷ Some of the cost savings from telehealth applications accrue not directly to the HCP or the patients, but rather to other governmental entities (through savings in Medicare and Medicaid expenditures) and to other participants in the health care system (such as private insurers).⁷⁸ We solicit the submission of specific information on all these possible sources of cost savings, including cost data and any studies documenting cost savings.

VI. PROCEDURAL MATTERS

13. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments are to reference **WC Docket No. 02-60 and DA 12-1166** and may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with

⁷⁶ See, e.g., NRHRC Dec. 27 *Ex Parte* Letter at 2 (stating that keeping more patients locally helps rural hospitals to be successful); Pilot Conference Call Mar. 16 *Ex Parte* Letter at 1-2 (ARCHIE *et al.*) at 1-2 (explaining that keeping patients locally is "better for patients and helps rural hospitals financially"). See also NRHRC Dec. 27 *Ex Parte* Letter at 2 (explaining that many CAHs are experiencing negative margins and facing increasing difficulties in accessing capital).

⁷⁷ USAC Mar. 16 Site Visit Reports at 7 (explaining that E-ICU allows patient to stay local, improving outcomes and decreasing stress and cost of travel for patients and families); Quarterly Report of Missouri Telehealth Network, DC Docket No. 02-60, at 6 (filed Jan. 31, 2012) (stating that telehealth utilization saved Missourians nearly 1,700 round trips to specialists' clinics in Columbia and Kirksville, resulting in saved fuel costs of over \$293,000).

⁷⁸ For example, PSPN estimates that it has saved Medicaid \$18 million over an 18-month period through use of tele-psychiatry in the emergency departments of HCPs in its network. PSPN Feb. 23 *Ex Parte* Letter at 1; see also PSPN Mar. 27 *Ex Parte* Letter at 1.

rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

- (1) Chin Yoo, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A441, Washington, D.C. 20554; e-mail: Chin.Yoo@fcc.gov;
- (2) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, D.C. 20554; e-mail: Charles.Tyler@fcc.gov.

14. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷⁹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

15. For further information, please contact Chin Yoo, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418-0295 or TTY (202) 418-0484.

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⁷⁹ 47 C.F.R. §§ 1.1200 *et seq.*

APPENDIX

List of Ex Parte Filings and Short Cites

PARTY	ABBREVIATION	DATE OF FILING	SHORT CITE
John Gale, Maine Rural Health Research Center	John Gale	Mar. 29, 2012	John Gale Mar. 29 <i>Ex Parte</i> Letter
National Association of Rural Health Clinics	NARHC	Mar. 26, 2012	NARHC Mar. 26 <i>Ex Parte</i> Letter
National Rural Health Association	NRHA	Dec. 21, 2011	NRHA Dec. 21 <i>Ex Parte</i> Letter
National Rural Health Resources Center	NRHRC	Dec. 27, 2011	NRHRC Dec. 27 <i>Ex Parte</i> Letter
National State Offices of Rural Health	NOSORH	Mar. 28, 2012	NOSORH Mar. 28 <i>Ex Parte</i> Letter
Office of the National Coordinator for Health Information Technology in the U.S. Department of Health and Human Services	ONC	Jan. 6, 2012	ONC Jan.6 <i>Ex Parte</i> Letter
Office of the National Coordinator for Health Information Technology in the U.S. Department of Health and Human Services	ONC	Jan. 17, 2012	ONC Jan. 17 <i>Ex Parte</i> Letter
Oregon Health Network	OHN	Feb. 28, 2012	OHN Feb. 28 <i>Ex Parte</i> Letter
Palmetto State Providers Network	PSPN	Feb. 23, 2012	PSPN Feb. 23 <i>Ex Parte</i> Letter
Palmetto State Providers Network	PSPN	Mar. 27, 2012	PSPN Mar. 27 <i>Ex Parte</i> Letter
Pilot Project Group Call (Alaska eHealth Network, Southwest Telehealth Access Grid, Tennessee Telehealth Network, Virginia Acute Stroke Telehealth Project, Texas Health Information Network Collaborative)	AEN SWTAG TTN VAST THINC	Mar. 26, 2012	Pilot Conference Call Mar. 26 <i>Ex Parte</i> Letter (AEN <i>et al.</i>)

PARTY	ABBREVIATION	DATE OF FILING	SHORT CITE
Pilot Project Group Call (Arizona Rural Community Health Information Exchange, Erlanger Health System, Kentucky Behavioral Telehealth Network)	ARCHIE Erlanger KBTN	Mar. 16, 2012	Pilot Conference Call Mar. 16 <i>Ex Parte</i> Letter (ARCHIE <i>et al.</i>)
Pilot Project Group Call (Pennsylvania Mountains Health Care Alliance, Palmetto State Providers Network, North Carolina Telehealth Network, Colorado Health Care Connections, Rocky Mountain HealthNet)	PMHA PSPN NCTN CHCC RMHN	Mar. 13, 2012	Pilot Conference Call Mar. 13 <i>Ex Parte</i> Letter (PMHA <i>et al.</i>)
Pilot Project Group Call (Western New York Rural Area Health Education Center, St. Joseph's Hospital, Sanford Health Collaboration and Communication Channel, Oregon Health Network, Geisinger Health System, Bacon County Health Services, Inc.)	WNYRAHEC. St. Joseph's Sanford OHN Geisinger Bacon County	Mar. 26, 2012	Pilot Conference Call Mar. 26 <i>Ex Parte</i> Letter (WNYRAHEC <i>et al.</i>)
Rocky Mountain HealthNet Colorado Health Care Connections	RMHN CHCC	Feb. 28, 2012	Colorado Feb. 28 <i>Ex Parte</i> Letter
Universal Service Administrative Company	USAC	Mar. 14, 2012	USAC Observations Letter
Universal Service Administrative Company	USAC	Apr. 12, 2012	USAC Needs Assessment
Universal Service Administrative Company	USAC	May 4, 2012	USAC May 4 Data Letter
Universal Service Administrative Company	USAC	May 30, 2012	USAC May 30 Data Letter
Universal Service Administrative Company	USAC	June 27, 2012	USAC June 27 Data Letter
Universal Service Administrative Company Site Visit Summary (Northeast Ohio Regional Health Information Network, Heartland Unified Broadband Network, PSPN, Iowa Rural Health Telecommunications Program, PMHA)	USAC	Mar. 16, 2012	USAC Mar. 16 Site Visit Reports

PARTY	ABBREVIATION	DATE OF FILING	SHORT CITE
Universal Service Administrative Company Site Visit Summary (NCTN, Bacon County)	USAC	Apr. 27, 2012	USAC Apr. 27 Site Visit Reports

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Application of T-Mobile License LLC and	)	WT Docket No. 12-175
Cellco Partnership d/b/a Verizon Wireless)	
For Consent To Assign Licenses)	

NRUF/LNP PROTECTIVE ORDER

Adopted: July 20, 2012

Released: July 20, 2012

By the Senior Deputy Chief, Wireless Telecommunications Bureau:

1. In connection with the Commission's review of the transaction at issue in this proceeding, the Commission expects to examine information contained in the Numbering Resource Utilization and Forecast ("NRUF") reports filed by carriers engaged in the provision of wireless telecommunications services¹ ("Wireless Telecommunications Carriers") and disaggregated, carrier-specific local number portability ("LNP") data related to Wireless Telecommunications Carriers. We anticipate that such materials will be necessary to develop a more complete record on which to base the Commission's decision. We also anticipate that parties participating in the proceeding may seek to review this data.

2. Section 251 of the Communications Act of 1934, as amended, grants the Commission jurisdiction over the North American Numbering Plan ("NANP") and related telephone numbering issues. In order to better monitor the way numbering resources are used within the NANP and efficiently allocate NANP resources, the Commission requires telecommunications carriers to provide the Commission with a utilization report of their current inventory of telephone numbers and a five-year forecast of their numbering resource requirements – the NRUF report.² LNP data are collected by the LNP Administrator and provided to the Commission. The Commission has recognized that disaggregated, carrier-specific forecast and utilization data should be treated as confidential and should be exempt from general public disclosure under 5 U.S.C. § 552(b)(4).³

3. While we are mindful of the highly sensitive nature of such information, we are also mindful of the right of the public to participate in this proceeding in a meaningful way. Therefore, consistent with past practice,⁴ the NRUF reports and LNP data will not be available to the public except pursuant to the terms of this NRUF/LNP Protective Order; we will make such information available to participants in this proceeding, but limit such access to their Outside Counsel of Record, their Outside Consultants and

¹ See 47 C.F.R. § 1.907, 52.5.

² 47 C.F.R. § 52.15(f). See *Numbering Resource Optimization*, CC Docket No. 99-200, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd. 7574, 7578-79 ¶ 5 (2000).

³ *Id.* at 7607 ¶ 78.

⁴ See, e.g., *AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket 11-65, Protective Order, 26 FCC Rcd 6031 (WTB 2011) and *AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket 08-246, Protective Order, 24 FCC Rcd 13915 (WTB 2009).

experts whom they retain to assist them in this proceeding, and their Outside Counsel's and Outside Consultants' employees. We conclude that the procedures we adopt in this NRUF/LNP Protective Order give appropriate access to the public while protecting especially competitively sensitive information from improper disclosure, and that the procedures we adopt thereby serve the public interest.⁵

4. *Definitions.* As used herein, capitalized terms not otherwise defined in this NRUF/LNP Protective Order shall have the following meanings:

"Acknowledgment" means the Acknowledgment of Confidentiality attached as Appendix A hereto.

"Competitive Decision-Making" means that a person's activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with a Wireless Telecommunications Carrier.

"NRUF/LNP Confidential Information" means the NRUF reports, the data contained in those reports, the LNP data, and any information derived from the reports or the data that is not otherwise available from publicly available sources.

"Outside Counsel of Record" or "Outside Counsel" means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, retained by a party in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making. The term "Outside Counsel of Record" includes any attorney representing a non-commercial party in this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

"Outside Consultant" means a consultant or expert retained for the purpose of assisting Outside Counsel or a party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term "Outside Consultant" includes any consultant or expert employed by a non-commercial party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.

"Reviewing Party" means a person who has obtained access to NRUF/LNP Confidential Information pursuant to paragraphs 5 or 8 of this NRUF/LNP Protective Order.

5. *Procedure for Obtaining Access to NRUF/LNP Confidential Information.* Any person seeking access to NRUF/LNP Confidential Information shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this NRUF/LNP Protective Order; and file the Acknowledgment with the Bureau, on behalf of the Commission, so that it is received at least five business days prior to such person's reviewing or having access to the NRUF/LNP Confidential Information, except that, where the person seeking access is one described in either clause 1 or 2 of paragraph 8, the Acknowledgment shall be delivered promptly prior to the person's obtaining access. Each Wireless Telecommunications Carrier shall have an opportunity to object to the disclosure of its NRUF/LNP Confidential Information to any such person. A Wireless Telecommunications Carrier must file any such objection at the Commission and serve it on Counsel representing, retaining or employing such person within three business days after that person's Acknowledgment has been filed with the Commission (or where the person seeking access is one described in clause 1 or 2 of paragraph 8, file and serve such objection as promptly as practicable after the Acknowledgment has been filed). Until any such objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access, a person subject to an objection

⁵ This NRUF/LNP Protective Order does not constitute a resolution of the merits concerning whether any information submitted under the NRUF/LNP Protective Order would be released publicly by the Commission upon a proper request under the Freedom of Information Act (FOIA) or otherwise.

from a Wireless Telecommunications Carrier shall not have access to that carrier's NRUF/LNP Confidential Information.

6. *Review of NRUF/LNP Confidential Information.* A Reviewing Party shall contact John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554, to receive instructions on how to obtain and review NRUF/LNP Confidential Information. A Reviewing Party may temporarily load onto a computer NRUF/LNP Confidential Information. Once loaded, any files containing NRUF/LNP Confidential Information shall be password protected immediately. The NRUF/LNP Confidential Information may not be stored on a computer after being analyzed. After the analysis is complete, the results of such analysis may be stored by saving the results (but not the original underlying NRUF/LNP Confidential Information) to a mobile data storage medium. All files containing NRUF/LNP Confidential Information shall be deleted from the computer as soon as practicable. The original disk containing the NRUF/LNP Confidential Information and the mobile storage medium containing the results shall be stored securely and a record kept of any persons given access to them.

7. *Use of NRUF/LNP Confidential Information.* Persons obtaining access to NRUF/LNP Confidential Information under this NRUF/LNP Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of any NRUF/LNP Confidential Information in its decision in this proceeding, it will do so by redacting any NRUF/LNP Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to NRUF/LNP Confidential Information under this NRUF/LNP Protective Order.

8. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of NRUF/LNP Confidential Information with another Reviewing Party and with the Commission and its staff. A Wireless Telecommunication Carrier's own NRUF/LNP Confidential Information may also be disclosed to employees and Counsel of the carrier. Subject to the requirements of paragraph 5, a Reviewing Party may disclose NRUF/LNP Confidential Information to: (1) paralegals or other employees of such Reviewing Party assisting them in this proceeding; and (2) employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding.

9. *Filings with the Commission.* A Reviewing Party may in any document that it files in this proceeding disclose NRUF/LNP Confidential Information only if it complies with the following procedure. The party shall submit to the Secretary's Office one copy of the filing containing NRUF/LNP Confidential Information (the "NRUF/LNP Confidential Filing"), two copies of the filing in redacted form, *i.e.*, containing no NRUF/LNP Confidential Information (the "Redacted NRUF/LNP Confidential Filing"), and an accompanying cover letter. The cover or first page of the NRUF/LNP Confidential Filing and each page of the NRUF/LNP Confidential Filing that contains or discloses NRUF/LNP Confidential Information must be clearly marked "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 12-175 before the Federal Communications Commission." The cover letter shall also contain this legend. The NRUF/LNP Confidential Filing shall be made under seal, and will not be placed in the Commission's public file. The two copies of the Redacted NRUF/LNP Confidential Filing and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted

NRUF/LNP Confidential Filing shall state that the party is filing a redacted version of the filing. Each Redacted NRUF/LNP Confidential Filing shall have the same pagination as the NRUF/LNP Confidential Filing from which it is derived. To the extent that any page of the NRUF/LNP Confidential Filing contains any type of Confidential Information and non-confidential information, only the Confidential Information (of whatever type) shall be redacted and the page of the unredacted Confidential Filing shall clearly distinguish among the various types of Confidential Information and the non-confidential information. Two copies of each NRUF/LNP Confidential Filing and the accompanying cover letter must be delivered in person to John Spencer, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3A-103, Washington, D.C. 20554. Parties should not provide courtesy copies of pleadings containing NRUF/LNP Confidential Information to Commission staff unless the Bureau so requests, and any such courtesy copies shall be submitted under seal.

10. *Non-Disclosure of NRUF/LNP Confidential Information.* Except as provided under this NRUF/LNP Protective Order, NRUF/LNP Confidential Information may not be disclosed further.

11. *Protection of Stamped NRUF/LNP Confidential Information.* A Reviewing Party shall have the obligation to ensure that access to NRUF/LNP Confidential Information is strictly limited as prescribed in this NRUF/LNP Protective Order. A Reviewing Party shall further have the obligation to ensure that NRUF/LNP Confidential Information is used only as provided in this NRUF/LNP Protective Order.

12. *Requests for Additional Disclosure.* If any person requests disclosure of NRUF/LNP Confidential Information outside the terms of this NRUF/LNP Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

13. *Client Consultation.* Nothing in this NRUF/LNP Protective Order shall prevent or otherwise restrict Outside Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of NRUF/LNP Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Outside Counsel shall not disclose NRUF/LNP Confidential Information.

14. *No Waiver of Confidentiality.* Disclosure of NRUF/LNP Confidential Information as provided herein by any person shall not be deemed a waiver by any affected party of any privilege or entitlement to confidential treatment of such NRUF/LNP Confidential Information. Reviewing Parties, by viewing this material agree: (1) not to assert any such waiver; (2) not to use NRUF/LNP Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of NRUF/LNP Confidential Information shall not be deemed a waiver of any privilege or entitlement.

15. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency issues a subpoena for or orders the production of NRUF/LNP Confidential Information that a party has obtained under terms of this NRUF/LNP Protective Order, such party shall promptly notify the Commission and each affected Wireless Telecommunications Carrier of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Commission and each affected Wireless Telecommunications Carrier has a full opportunity to oppose such production prior to the production or disclosure of any NRUF/LNP Confidential Information.

16. *Violations of NRUF/LNP Protective Order.* Should a Reviewing Party violate any of the terms of this NRUF/LNP Protective Order, such Reviewing Party shall immediately convey that fact to the Commission. Further, should such violation consist of improper disclosure of NRUF/LNP Confidential Information, the violating person shall take all necessary steps to remedy the improper

disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this NRUF/LNP Protective Order, including but not limited to suspension or disbarment of Counsel or Outside Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to NRUF/LNP Confidential Information in this or any other Commission proceeding. Nothing in this NRUF/LNP Protective Order shall limit any other rights and remedies available to the affected Wireless Telecommunications Carriers at law or in equity against any person using NRUF/LNP Confidential Information in a manner not authorized by this NRUF/LNP Protective Order.

17. *Termination of Proceeding.* The provisions of this NRUF/LNP Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Parties shall destroy or return to the Commission all NRUF/LNP Confidential Information and all copies of the same. No material whatsoever containing NRUF/LNP Confidential Information may be retained by any person having access thereto, except Outside Counsel may retain, under the continuing strictures of this NRUF/LNP Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain NRUF/LNP Confidential Information, and one copy of orders issued by the Commission or Bureau that contain NRUF/LNP Confidential Information. All Outside Counsel shall certify compliance with these terms and shall deliver such certification to the Commission not more than three weeks after conclusion of this proceeding. The provisions of this paragraph regarding retention of NRUF/LNP Confidential Information shall not be construed to apply to the Commission or its staff.

18. *Authority.* This Order is issued pursuant to sections 4(i), 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214 and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Senior Deputy Chief, Wireless Telecommunications Bureau

APPENDIX A

Acknowledgment of Confidentiality

WT Docket No. 12-175

I hereby acknowledge that I have received and read a copy of the foregoing NRUF/LNP Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the NRUF/LNP Protective Order and that I shall not disclose or use NRUF/LNP Confidential Information except as allowed by the NRUF/LNP Protective Order.

I acknowledge that a violation of the NRUF/LNP Protective Order is a violation of an order of the Federal Communications Commission.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the NRUF/LNP Protective Order is due solely to my capacity as Outside Counsel or Outside Consultant to a party or as a person described in paragraph 8 of the foregoing NRUF/LNP Protective Order and agree that I will not use such information in any other capacity.

I acknowledge that it is my obligation to ensure that NRUF/LNP Confidential Information is used only as specifically permitted by the terms of the NRUF/LNP Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of NRUF/LNP Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order or the NRUF/LNP Protective Order.

Executed this ____ day of _____, 2012.

[Name]

[Position]

[Address]

[Telephone]



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1169

Released: July 20, 2012

**PROPOSED ASSIGNMENT OF LICENSES FROM
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS TO T-MOBILE LICENSE LLC**

**NUMBERING RESOURCE UTILIZATION AND FORECAST REPORTS
AND LOCAL NUMBER PORTABILITY REPORTS TO BE PLACED INTO THE RECORD,
SUBJECT TO PROTECTIVE ORDER**

WT Docket No. 12-175
CC Docket No. 99-200

Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and T-Mobile License LLC ("T-Mobile"), a wholly-owned subsidiary of T-Mobile USA, Inc. (collectively, the "Applicants") have filed a series of applications ("Applications")¹ pursuant to Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"),² seeking approval for the full and partial assignments of Advanced Wireless Service ("AWS-1") licenses by and between the Applicants. The proposed transaction involves licenses in 218 Cellular Market Areas ("CMAs").³ On June 26, 2012, the Commission accepted the Applications for filing, established a pleading cycle, and opened a docket, WT Docket No. 12-175, for the proposed transaction.⁴

In connection with the Commission's review of the proposed transaction, the Commission intends to examine information contained in the biannual Numbering Resource Utilization and Forecast ("NRUF") reports filed by wireless telecommunications carriers,⁵ carrier-specific local number portability ("LNP") data related to wireless telecommunications carriers, and further disaggregated monthly carrier-specific local number portability data ("Carrier-to-Carrier LNP Data") related to wireless telecommunications carriers. These data may assist the Commission in assessing the competitive effects of the transaction. Accordingly, subject to the provisions of a protective order ("NRUF Protective Order") being adopted this day⁶ the Commission intends to place into the record in this proceeding:

¹ File No. 0005272585 is the lead application for this transaction.

² 47 U.S.C. § 310(d).

³ Applications, Exhibit I, Description of Transaction and Public Interest Statement at 1.

⁴ Cellco Partnership d/b/a Verizon Wireless and T-Mobile License LLC Seek Commission Consent to the Assignment of Advanced Wireless Service Licenses, WT Docket No. 12-175, *Public Notice*, DA 12-999 (June 26, 2012).

⁵ See 47 C.F.R. §§ 1.907, 52.5.

⁶ See Application of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses, WT Docket No. 12-175, *NRUF/LNP Protective Order*, DA 12-1168 (WTB, July 19, 2012).

- NRUF reports for all wireless telecommunications carriers concerning data as of December 31, 2008, June 30, 2009, December 31, 2009, June 30, 2010, December 31, 2010, June 30, 2011, and December 31, 2011.
- Wireless-to-wireless LNP data for all wireless telecommunications carriers from the December 2008, June 2009, December 2009, June 2010, December 2010, June 2011, and December 2011 LNP databases that the Commission receives from the LNP Administrator, NeuStar, Inc. This LNP data shows the total number of ports in and ports out per carrier.
- Wireless-to-wireless Carrier-to-Carrier LNP Data for all wireless telecommunications carriers, on a monthly basis, from the December 2008 to December 2011 LNP databases that the Commission receives from the LNP Administrator, NeuStar, Inc. This LNP data shows, on a monthly basis, the specific number of ports from each wireless carrier to another carrier in each area.

Section 251 of the Communications Act grants the Commission jurisdiction over the North American Numbering Plan ("NANP") and related telephone numbering issues.⁷ In order to better monitor the way numbering resources are used within the NANP and efficiently allocate NANP resources, the Commission requires telecommunications carriers to provide the Commission with a utilization report of their current inventory of telephone numbers and a five-year forecast of their numbering resource requirements.⁸ LNP data are collected by the LNP Administrator and provided to the Commission.

The Commission has recognized that disaggregated, carrier-specific forecast and utilization data should be treated as confidential and should be exempt from public disclosure under 5 U.S.C. § 552(b)(4).⁹ The NRUF and LNP reports will be placed into the record subject to the provisions of the NRUF Protective Order. As such, the NRUF and LNP data will not be available to the public except pursuant to the terms of the NRUF Protective Order, as outlined below.

Persons seeking to review the NRUF or LNP data may do so only for purposes of participating in this proceeding. Pursuant to the NRUF Protective Order, outside persons participating or intending to participate in the proceeding who are not involved in competitive decision-making activities and who have signed the Acknowledgment of Confidentiality attached to the NRUF Protective Order may review the NRUF and LNP data. We emphasize that persons seeking to review the NRUF or LNP data must have adequate protections in place to prevent improper use or disclosure of the information.

Affected parties have until **July 30, 2012** to oppose disclosure of their NRUF and LNP data. In addition, affected parties will have three business days after the filing of an Acknowledgment of Confidentiality to object to the release of the data to a particular person who requests permission to review it.

If the Commission receives no opposition from affected parties by July 30, 2012, the Commission will place the NRUF, LNP and Carrier-to-Carrier LNP data into the record subject to the safeguards contained in the NRUF Protective Order. If disclosure is opposed, the procedures set forth in 47 C.F.R. § 0.461(i) shall apply. All filings should refer to WT Docket No. 12-175.

⁷ 47 U.S.C. § 251.

⁸ 47 C.F.R. § 52.15(f). See *Numbering Resource Optimization*, CC Docket No. 99-200, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 7574, 7578-79 ¶ 5 (2000).

⁹ *Id.* at 7607 ¶ 78.

Under the Commission's current procedures for the submission of filings and other documents,¹⁰ submissions in this matter may be filed electronically (*i.e.*, through ECFS) or by hand delivery to the Commission.

- **If filed by ECFS,**¹¹ comments shall be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and WT Docket No. 12-175. Parties may also submit an electronic comment by Internet e-mail. Parties are reminded that unredacted comments and other material containing confidential information may not be filed electronically.
- **If filed by paper,** the original and four copies of each filing must be filed by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

One copy of each pleading must be delivered electronically, by e-mail or facsimile, or, if delivered as paper copy, by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (according to the procedures set forth above for paper filings), to: (1) the Commission's duplicating contractor, Best Copy and Printing, Inc., at 445 12th St., SW, Room CY-B402, Washington, DC 20554, fcc@bcpiweb.com, or (202) 488-5563 (facsimile); (2) John Spencer, Broadband Division, Wireless Telecommunications Bureau, at john.spencer@fcc.gov, or (202) 418-7247 (facsimile); (3) Kate Mataves, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, at catherine.mataves@fcc.gov, or (202) 418-7447 (facsimile); and (4) Jim Bird, Office of General Counsel, at transactionteam@fcc.gov, or (202) 418-1234 (facsimile).

This action is taken pursuant to Sections 4(i) and 310(d) of the Communications Act, 47 U.S.C. §§ 154(i), 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, and is effective upon its adoption.

For further information, contact John Spencer, Broadband Division, Wireless Telecommunications Bureau, at (202) 418-1896, or Kate Mataves, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, at (202) 418-7878.

-FCC-

¹⁰ See FCC Announces Change in Filing Location for Paper Documents, *Public Notice*, 24 FCC Red 14312 (2009).

¹¹ See Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, 13 FCC Red 11322 (1998).



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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Internet: <http://www.fcc.gov>
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DA 12-1170

Released: July 20, 2012

**PUBLIC SAFETY AND HOMELAND SECURITY BUREAU SEEKS COMMENT ON REQUEST
FOR WAIVER OF THE DECEMBER 31, 2016 700 MHZ NARROWBAND DEADLINE FILED
BY STATE OF LOUISIANA**

PS DOCKET 06-229

COMMENTS DUE: August 3, 2012

By this Public Notice, the Public Safety and Homeland Security Bureau (PSHSB) seeks comment on a petition for waiver¹ filed by the State of Louisiana (Louisiana) to operate the Louisiana Wireless Information Network (LWIN) in the 700 MHz narrowband spectrum utilizing the current 12.5 kHz channel efficiency through December 31, 2024.²

Louisiana has developed LWIN to provide an interoperable public safety network in the state. LWIN utilizes 700 MHz spectrum designated for narrowband use by public safety.³ Louisiana states that LWIN "consists of 67,162 users making it the largest statewide radio system in the country."⁴ The State covers all of the costs associated with LWIN administration, maintenance and operation.⁵

In support of its Petition for Waiver, Louisiana argues that, "the purpose of the 6.25 kHz channel mandate is to allow for a more efficient use of the 700 MHz spectrum dedicated to public safety."⁶ Louisiana argues that, "LWIN is fully built and operational across the State of Louisiana and is already using available spectrum to provide mission critical voice communications to its first responder community."⁷ Additionally, "the cost to build new radio systems for the reconfigured 700 MHz spectrum is cost prohibitive and any new system in Louisiana within the last six years has been built to operate in the VHF and UHF spectrum."⁸ Louisiana further argues that, "while the 6.25 kHz channel efficiency

¹ Petition for Waiver of Rules, State of Louisiana, PS Docket 06-229 (filed Jul. 3, 2012) (Louisiana Petition).

² Previously, the State sought broader consideration of a change in the narrowbanding through a Petition for Rulemaking. See Petition for Rulemaking of the State of Louisiana, RM-11577 (filed Oct. 5, 2009).

³ Louisiana Petition at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.*

mandate was intended to provide greater efficiency and access to spectrum, both aims have already been achieved in Louisiana.”⁹

Louisiana states that, “with the 6.25 kHz channel efficiency mandate quickly approaching, local municipalities are considering alternatives to providing mission critical voice communications to first responders because the cost to replace their entire inventory of subscriber units in order to achieve compliance with the Commission’s narrowbanding mandate is cost prohibitive.”¹⁰ Thus, “the practical effect of the narrowbanding mandate is that the State’s largest homeland security region, Greater New Orleans, may leave LWIN and build a separate, incompatible 800 MHz radio system.”¹¹ Therefore, “the public’s best interest would not be served as the ability of first responders from cross jurisdictional boundaries to communicate during times of emergencies would be severely diminished.”¹² Finally, Louisiana asserts that “the cost of meeting the Commission’s mandate would exceed the total amount the State spent to build LWIN and equip the first responder community with more than 67,000 subscriber units,” and that the “State could not muster the funding necessary to implement the upgrades,” making application of this rule unduly burdensome.¹³

By this Public Notice, we seek comment on Louisiana’s petition and announce the pleading cycle during which comments and replies may be filed.

This proceeding will be treated as “permit but disclose” for purposes of the Commission’s *ex parte* rules. See generally 47 C.F.R. §§ 1.1200-1.1216. As a result of the permit-but-disclose status of this proceeding, *ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission’s rules applicable to non-restricted proceedings.¹⁴ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). Written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

Parties may file comments on the Petition on or before **August 3, 2012**. Please place the docket number, **PS Docket 06-229**, on all filings. Comments may be filed using the Commission’s Electronic

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

¹³ See Louisiana Petition at 6; Louisiana Petition at 7.

¹⁴ 47 C.F.R. § 1.1206.

Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
 - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- **People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Copies of the Petition and any subsequently filed documents in this matter are also available for inspection in the Commission's Reference Information Center:

445 12th Street, S.W., CY-Level
Washington, D.C. 20554
(202) 418-0270

For further information, contact: Aaron Garza, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418-1175 or aaron.garza@fcc.gov.

Action by the Chief, Public Safety and Homeland Security Bureau.

– FCC –



Enforcement Bureau
Investigations and Hearings
Division

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

July 20, 2012

DA 12-1171

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED
AND E-MAIL

Ms. Gloria F. Harper
c/o Ms. Cynthia Marie Cimino
Federal Public Defender
Hale Boggs Federal Building
500 Poydras St., Room 318
New Orleans, LA 70130

Re: Notice of Debarment
File No. EB-12-IH-0400

Dear Ms. Harper:

The Federal Communications Commission (Commission) hereby notifies you that, pursuant to Section 54.8 of its rules, you are prohibited from participating in the schools and libraries universal service support mechanism (E-Rate program) for three years from either the date of your receipt of this Notice of Debarment, or of its publication in the Federal Register, whichever is earlier in time (Debarment Date).¹

On March 22, 2012, the Commission's Enforcement Bureau (Bureau) sent you a Notice of Suspension and Initiation of Debarment Proceeding (Notice of Suspension)² that was published in the Federal Register on April 23, 2012.³ The Notice of Suspension suspended you from participating in activities associated with or relating to the E-Rate program. It also described the basis for initiating debarment proceedings against you, the applicable debarment procedures, and the effect of debarment.

As discussed in the Notice of Suspension, in June 2011 you pled guilty to conspiring with others to fraudulently obtain \$4.5 million in E-Rate contracts through your companies,

¹ 47 C.F.R. § 54.8(g). *See also* 47 C.F.R. § 0.111 (delegating authority to the Enforcement Bureau to resolve universal service suspension and debarment proceedings).

² Letter from Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Ms. Gloria F. Harper, Notice of Suspension and Initiation of Debarment Proceeding, 27 FCC Rcd 2888 (Enf. Bur. 2012) (Attachment 1).

³ 77 Fed. Reg. 24202 (Apr. 23, 2012).

Ms. Gloria F. Harper
July 20, 2012

Computer Training and Associates and Global Networking Technologies.⁴ In addition, you admitted to bribing school officials in exchange for control of the E-Rate application and competitive bidding process.⁵ Your fraudulent scheme adversely affected 20 schools and school districts located throughout six states.⁶ Pursuant to Section 54.8(c) of the Commission's rules, your conviction of criminal conduct in connection with the E-Rate program is the basis for this debarment.⁷

In accordance with the Commission's debarment rules, you were required to file with the Commission any opposition to your suspension or its scope, or to your proposed debarment or its scope, no later than 30 calendar days from either the date of your receipt of the Notice of Suspension or of its publication in the Federal Register, whichever date occurred first.⁸ The Commission did not receive any such opposition.

For the foregoing reasons, you are debarred from participating in the E-Rate program for three years from the Debarment Date.⁹ During this period, you are excluded from participating in any activities associated with or related to the E-Rate program, including the receipt of funds or discounted services through the E-Rate program, or consulting with, assisting, or advising applicants or service providers regarding the E-Rate program.¹⁰

Sincerely,

Theresa Z. Cavanaugh, Chief
Investigations and Hearings Division
Enforcement Bureau

cc: Johnnay Schrieber, Universal Service Administrative Company (via e-mail)
Rashann Duvall, Universal Service Administrative Company (via e-mail)
Juan Rodriguez, Antitrust Division, United States Department of Justice (via e-mail)
Stephanie Toussaint, Antitrust Division, United States Department of Justice (via e-mail)

⁴ *United States v. Gloria F. Harper*, Criminal Docket No. 2:10-cr-00326-CJB-A1.C, Plea Agreement at 3-5 (E.D. La. entered June 6, 2011).

⁵ *Id.* at 4.

⁶ *Id.* at 5. See Appendix.

⁷ 47 C.F.R. § 54.8(c).

⁸ 47 C.F.R. §§ 54.8(c)(3), (4). Any opposition had to be filed no later than April 21, 2012.

⁹ *Id.* §§ 54.8(e)(5), (g).

¹⁰ *Id.* §§ 54.8(a)(1), (5), (d).

Appendix

Schools and School Districts ¹	City and State
All Saints School	New Orleans, LA
St. Augustine High School	New Orleans, LA
St. David School	New Orleans, LA
St. Monica School	New Orleans, LA
Gould Public School District	Gould, AR
Holly Grove Public School District	Holly Grove, AR
Antioch Center – St. Stephen’s Lutheran Church	Antioch, IL
Fairfield Center	Round Lake Beach, IL
Ingleside Center – Ingleside United Methodist Church	Ingleside, IL
St. Mary’s Center – Libertyville Covenant Church	Libertyville, IL
Waukegan Center	Waukegan, IL
Zion Center – Zion Benton High School	Zion, IL
Niles Terrace Center	Waukegan IL
Wilmer – Hutchins Independent School District	Dallas, TX
Innovation Child Development Center	Tallahassee, FL
Innovation School of Excellence	Tallahassee, FL
Capital City School (also known as Covenant Academy Preparatory School)	Tallahassee, FL
Whole Word Christian Academy	Miami, FL
Twin Buttes Elementary School	Halliday, N.D.
White Shield School	Roseglenn, N.D.

THE OHIO STATE UNIVERSITY
MORTZ LAW LIBRARY

¹ *United States v. Gloria F. Harper*, Criminal Docket No. 2:10-cr-00326-CJB-ALC. Factual Basis at 2–3.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Review and/or Requests for)	
Waiver of the Decisions of the)	
Universal Service Administrator by)	
)	
Al Noor High School	)	File Nos. SLD-529343, <i>et al.</i>
Brooklyn, New York, <i>et al.</i>)	
)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: July 23, 2012

Released: July 23, 2012

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we grant 16 requests from petitioners² seeking review of decisions made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program).³ In each case, USAC denied or rescinded funding because it found that the petitioners violated the Commission's rule that a contract or legally binding agreement be in place when the FCC Form 471 application is submitted.⁴ We also dismiss as moot two requests for review.⁵

¹ See *Request for Waiver of the Decision of the Universal Service Administrator by Barberton City School District, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SL.D-400938, *et al.*, CC Docket No. 02-6, 23 FCC Rcd 15526 (Wireline Comp. Bur. 2008) (*Barberton Order*) (finding, among other things, that petitioners all had some form of an agreement in place during the relevant funding year prior to the filing of their applications, notwithstanding minor irregularities with respect to the contracts at issue) and *Requests for Review and/or Requests for Waiver of the Decisions of the Universal Service Administrator by Animas School District 6, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-427902, *et al.*, CC Docket No. 02-6, 26 FCC Rcd 16903 (Wireline Comp. Bur. 2011) (granting petitioners' appeals consistent with the *Barberton Order*).

² The requests for review and for review and waiver granted by this Order are listed in Appendices A and B.

³ Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

⁴ See 47 C.F.R. § 54.504(a).

⁵ The requests for review that are dismissed by this Order are listed in Appendix C.

2. As an initial matter, consistent with precedent, we waive⁶ section 54.720 of the Commission's rules, which requires applicants to seek review of a USAC decision within 60 days, for Cook County School District 130, Edgewood Independent School District, Mayer Unified School District 43, and Richland Springs Independent School District because we find that they submitted their appeals to the Commission or USAC only a few days late.⁷ Based on our review of the record, we find that the 13 petitioners identified in Appendix A have demonstrated that good cause exists to justify waiver of the rule that a signed contract be in place when the FCC Form 471 application is submitted.⁸ Although the record demonstrates that the petitioners' contracts had minor errors or were not signed and dated by both parties before the petitioners filed their FCC Form 471 applications, all petitioners had some form of an agreement in place during the relevant funding year prior to the filing of their FCC Form 471 applications. We therefore waive the Commission's rules requiring that a signed contract be in place prior to the filing of an FCC Form 471 for these 13 petitioners.⁹ We also grant the appeals of the three petitioners identified in Appendix B because these petitioners demonstrated that they had contracts in place that complied with the Commission's rules and procedures when submitting their FCC Form 471 applications. Additionally, we dismiss as moot the request for review identified in Appendix C and filed by Atlantic City BVE-Admin (Atlantic City) and Lyme-Old Lyme Public Schools (Lyme-Old Lyme) because, on appeal, USAC reversed its initial determinations and issued new decisions approving funding for Atlantic City and Lyme-Old Lyme.¹⁰

3. On our own motion, we waive section 54.507(d) of the Commission's rules and direct USAC to waive any procedural deadline, such as the invoicing deadline, that might be necessary to effectuate our ruling.¹¹ We find good cause to waive section 54.507(d) because filing an appeal of a

⁶ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁷ See 47 C.F.R. § 54.720; *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by ABC Unified School District, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-584091, et al., CC Docket No. 02-6, Order, 26 FCC Rcd 11019 (Wireline Comp. Bur. 2011) (waiving our filing deadline for appeals because petitioners submitted their appeals to the Commission within a reasonable period of time after receiving actual notice of USAC's adverse decision). Cook County School District 130, Edgewood Independent School District, and Mayer Unified School District 43 filed their appeals one day late. Richland Springs Independent School District filed its appeal two days late.

⁸ See 47 C.F.R. § 54.504(a) (previously codified at 47 C.F.R. § 54.504(c)).

⁹ *Id.*

¹⁰ See Letter from Martin Friedman, Atlantic City BVE-Admin, to USAC, Schools and Libraries Division (dated Oct. 10, 2011) (Atlantic City Appeal to USAC); Letter from USAC, Schools and Libraries Division, to Martin Friedman, Atlantic City BVE-Admin (dated Jan. 26, 2012 (Administrator's Decision on Appeal Letter)); Letter from John Rhodes, Lyme-Old Lyme Public Schools, to USAC, Schools and Libraries Division (dated June 5, 2006) (Lyme-Old Lyme Appeal to USAC); Letter from USAC, Schools and Libraries Division, to John Rhodes, Lyme-Old Lyme Public Schools (dated Oct. 10, 2006) (Administrator's Decision on Appeal Letter).

¹¹ 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).

denial is likely to cause the applicant to miss the program's subsequent procedural deadlines in that funding year. We also find that at this time there is no evidence of waste, fraud and abuse in the record.

4. We therefore remand the underlying applications listed in the Appendices A and B to USAC for further action consistent with this order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in Appendix A and B and issue an award or denial based upon a complete review and analysis no later than 90 calendar days from the release of this order. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the underlying applications. We direct USAC to discontinue recovery actions against those parties based on the denials that are addressed herein.¹²

5. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), the Requests for Review and/or Requests for Waiver filed by the petitioners as listed in Appendices A and B ARE GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this order.

6. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Requests for Review and/or Requests for Waiver filed by the petitioners as listed in Appendix C ARE DISMISSED.

7. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3 of the Commission's rules, that section 54.720(a) of the Commission's rules, 47 C.F.R. § 54.720(a), IS WAIVED for Cook County School District 130, Edgewood Independent School District, Mayer Unified School District 43, and Richland Springs Independent School District.

8. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), section 54.504(a) of the Commission's rules, 47 C.F.R. § 54.504(a) IS WAIVED for the petitioners as listed in Appendix A.

¹² See Cook County School District 130, East St. Louis School District No. 189, Eastern Upper Peninsula Intermediate School District, Edgewood Independent School District, Holy Rosary Elementary Academy, Kingsville Independent School District, Mayer Unified School District 43, Richland Springs Independent School District, and Royal Independent School District. USAC shall cease recovery actions against both the applicant and the service provider, unless otherwise provided in this order.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that section 54.507(d) of the Commission's rules, 47 C.F.R. § 54.507(d), IS WAIVED for the parties to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

APPENDIX A**Petitioners Granted Waivers**

Petitioner	Application Number(s)	Funding Year	Date Appeal Filed
Al Noor High School Brooklyn, New York	529343	2006	June 8, 2007
Cook County School District Blue Island, Illinois	301034	2002	Mar. 21, 2011
Eastern Upper Peninsula Intermediate School District Sault Ste. Marie, Michigan	365335 365661	2003	Feb. 12, 2010
Edgewood Independent School District San Antonio, Texas	733321	2010	May 3, 2012
Edgewood Independent School District San Antonio, Texas	687739	2009	May 14, 2012
Holtville Unified School District Holtville, California	807589	2011	Dec. 13, 2011
Holy Rosary Elementary Academy Union City, New Jersey	458734 459674	2005	Sept. 29, 2009
Kingsville Independent School District Kingsville, Texas	369934	2003	Jan. 5, 2010
Los Fresnos Consolidated Independent School District Los Fresnos, Texas	366160	2003	Nov. 29, 2007
Mayer Unified School District 43 Mayer, Arizona	486830	2005	Sept. 28, 2009
Richland Springs Independent School District Richland Springs, Texas	288683 406735	2002 2004	Dec. 17, 2007
Royal Independent School District Pattison, Texas	351477	2003	Jan. 11, 2011
Wayne County Public Schools Goldsboro, North Carolina	772229	2011	Apr. 12, 2012

APPENDIX B**Petitioners Appeals Granted on the Merits**

Petitioner	Application Number(s)	Funding Year	Date Appeal Filed
Ascension Parish School District Donaldsonville, Louisiana	530997	2006	Mar. 12, 2007
East St. Louis School District No. 189 East St. Louis, Illinois	200698	200	Mar. 31, 2009
Manchester City Library Manchester, New Hampshire	777471	2011	Jan. 6, 2012

APPENDIX C**Petitioners Appeals Dismissed**

Petitioner	Application Number(s)	Funding Year	Date Appeal Filed
Atlantic City BVE-Admin Atlantic City, New Jersey	520460	2006	Oct. 18, 2011
Lyme-Old Lyme Public Schools Old Lyme, Connecticut	526727	2006	June 30, 2006



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-6322

DA 12-1173
July 23, 2012

NOTICE OF DOMESTIC SECTION 214 AUTHORIZATION GRANTED

WC Docket No. 12-157

The Wireline Competition Bureau (Bureau) has granted the application listed in this notice pursuant to the Commission's streamlined procedures for domestic section 214 transfer of control applications, 47 C.F.R. § 63.03. The Bureau has determined that grant of this application serves the public interest.¹ For purposes of computation of time when filing a petition for reconsideration or application for review, or for judicial review of the Commission's decision, the date of "public notice" shall be the release date of this notice.²

Domestic Section 214 Application Filed for the Transfer of Control of Network Billing Systems, LLC to Fusion Telecommunications International, Inc., WC Docket No. 12-157 Public Notice, DA 12-987 (rel. June 22, 2012).

Effective Grant Date: July 23, 2012

For further information, please contact Myrva Charles at (202) 418-1506, or Dennis Johnson (202) 418-0809, Competition Policy Division, Wireline Competition Bureau.

-FCC-

¹ *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, CC Docket No. 01-150, Report and Order, 17 FCC Rcd 5517, 5529, para. 22 (2002).

² *Id.*: see 47 C.F.R. § 1.4 (Computation of time).



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1174

July 23, 2012

DOMESTIC SECTION 214 AUTHORIZATION GRANTED

**Domestic Section 214 Application Filed for the Transfer of Control of
UPN Holdings LLC from Banc of America Capital Investors V, L.P. to REP UP, L.P.**

WC Docket No. 12-131

On May 14, 2012, Banc of America Capital Investors V, L.P. (BAC) and REP UP, L.P. (REP) (collectively, Applicants) filed an application pursuant to section 63.03 of the Commission's rules¹ requesting approval for the transfer of control of UPN Holdings LLC from BAC to REP.

On June 19, 2012, the Wireline Competition Bureau (Bureau) released a public notice accepting the application for streamlined processing.² On July 3, 2012, the Department of Justice, including the Federal Bureau of Investigation, with the concurrence of the Department of Homeland Security (collectively, the Executive Branch Agencies), filed a letter requesting that the Commission defer action on this application while they reviewed potential national security, law enforcement, and public safety issues.³ In response to the request, the Bureau removed the application from streamlined review.⁴ On July 19, 2012, the Executive Branch Agencies withdrew their request to defer action, stating that they have no objection to the application.⁵

The Bureau finds, upon consideration of the record, that grant of the application will serve the public interest, convenience, and necessity. Upon consummation of the transaction, the resulting entity would have a market share in the U.S. interstate interexchange market of less than 10 percent and would provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction. In addition, neither of the Applicants is dominant with respect to any domestic service.⁶

¹ 47 C.F.R. § 63.03; see 47 U.S.C. § 214.

² *Domestic Section 214 Application Filed for the Transfer of Control of UPN Holdings LLC from Banc of America Capital Investors V, L.P. to REP UP, L.P.*, WC Docket No. 12-131, Public Notice, DA 12-971 (rel. June 19, 2012).

³ Letter from Jennifer Rockoff, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 12-131 (filed July 3, 2012).

⁴ *Notice of Removal of Domestic Section 214 Application From Streamlined Treatment*, WC Docket No. 12-131, Public Notice, DA 12-1105 (rel. July 11, 2012).

⁵ Letter from Jennifer Rockoff, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 12-131 (filed July 19, 2012).

⁶ 47 C.F.R. 63.03(b)(2)(i).

Consistent with Commission precedent, the Bureau accords the appropriate level of deference to the Executive Branch Agencies' expertise on national security and law enforcement issues.⁷ Therefore, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, the Bureau hereby grants the application discussed in this Public Notice.

Pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, the grant is effective upon release of this Public Notice. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of this Public Notice.

For further information, please contact Dennis Johnson at (202) 418-0809, Competition Policy Division, Wireline Competition Bureau.

⁷ The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing a transfer of control or assignment application in which foreign ownership is an issue. *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24170-72, paras. 178-82 (1997); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23919-21, paras. 61-66 (1997) (*Foreign Participation Order*), Order on Reconsideration, 15 FCC Rcd 18158 (2000). In assessing the public interest, the Commission considers the record and accords the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues. *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of a Decision of the Universal)	
Service Administrator by)	
)	
La Poynor Independent School District	)	File No. SLD-773707
LaRue, Texas)	
)	
Schools and Libraries Universal Service Support	)	CC Docket No. 02-6
Mechanism)	

ORDER

Adopted: July 23, 2012

Released: July 23, 2012

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we grant a request from the LaPoynor Independent School District (LaPoynor ISD) seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program).² USAC denied LaPoynor ISD's application because it found that LaPoynor ISD sought cancellation of its funding requests. Based on our review of the record, we find that LaPoynor ISD has demonstrated that good cause exists to grant its request because LaPoynor did not intend to cancel its entire application but rather just one of its funding requests.³ We also waive⁴ for

¹ *Requests for Review of Decisions of the Universal Service Administrator by Joseph Jingoli & Son, Inc., et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-475364, et al., CC Docket No. 02-6, Order, 22 FCC Red 19227 (Wireline Comp. Bur. 2007) (granting petitioners' appeals after finding that minor mistakes do not warrant the complete rejection of the petitioners' applications); *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Baker Hall School, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-596432, et al., CC Docket No. 02-6, Order, 25 FCC Red 17534 (Wireline Comp. Bur. 2010) (granting petitioners' appeals consistent with the *Joseph Jingoli Order*).

² Letter from Donna Crook, LaPoynor Independent School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 10, 2011) (LaPoynor ISD Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ LaPoynor ISD states that it inadvertently canceled what it thought was only one funding request number (FRN), FRN 2099215, on its FCC Form 471 application number 773707 and did not realize it had actually canceled its entire FCC Form 471 application. See LaPoynor ISD Request for Review at 1.

⁴ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir.

LaPoynor ISD, section 54.720 of the Commission's rules which requires applicants to seek review of a USAC decision within 60 days, because we find that LaPoynor ISD submitted its appeal within a reasonable period of time after receiving actual notice of USAC's adverse decision.⁵ We also find that at this time there is no evidence of waste, fraud and abuse in the record.

2. We therefore remand the LaPoynor ISD's underlying application to USAC for further action consistent with this order. To ensure that the application is resolved expeditiously, we direct USAC to complete its review of the application and issue a funding commitment or denial based on a complete review and analysis no later than 90 calendar days from the release date of this order. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application.

3. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the requests for review filed by LaPoynor Independent School District, LaRue, Texas IS GRANTED and its underlying application IS REMANDED to USAC for further consideration in accordance with the terms of this order.

4. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that section 54.720 of the Commission's rules, 47 C.F.R. § 54.720, IS WAIVED for LaPoynor Independent School District, LaRue, Texas.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁵ See 47 C.F.R. § 54.720; *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by ABC Unified School District, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-584091, et al., CC Docket No. 02-6, Order, 26 FCC Red 11019 (Wireline Comp. Bur. 2011) (granting petitioners waivers of our filing deadline for appeals because they submitted their appeals to the Commission within a reasonable period of time after receiving actual notice of USAC's adverse decision). Based on the record, LaPoynor received its funding commitment decision letter during the summer break but filed an appeal as soon as the school session began in the fall. See Letter from USAC, Schools and Libraries Division, to Donna Crook, LaPoynor Independent School District (dated June 23, 2011).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rollins College	)	File No.: EB-11-TP-0093
	)	NAL/Acct. No.: 201232700007
Licensee of Broadcast Station WPRK	)	FRN: 0004575213
Winter Park, Florida	)	Facility ID No.: 57473

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the District Director, Tampa Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Rollins College, licensee of Station WPRK, in Winter Park, Florida, apparently willfully and repeatedly violated Section 73.3527 of the Commission's rules (Rules)¹ by failing to maintain and make available a complete public inspection file. We conclude that Rollins College is apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000). We further direct Rollins College to submit a written statement signed under penalty of perjury, no later than 30 days from the release date of this NAL, stating that Station WPRK is maintaining a complete public inspection file.

II. BACKGROUND

2. On October 28, 2011, in response to a complaint, agents from the Commission's Tampa Office (Tampa Office), accompanied by the station's manager, conducted an inspection of Station WPRK's main studio during regular business hours. In response to a request to inspect the station's public inspection file, the station manager produced a public inspection file that was missing all issues/programs lists after 2007. The station manager was unable to explain why the issues/programs lists were missing for 2008-2011.

III. DISCUSSION

3. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.² Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.³ The legislative history to Section 312(f)(1) of the Act clarifies that this

¹ 47 C.F.R. § 73.3527.

² 47 U.S.C. § 503(b).

³ 47 U.S.C. § 312(f)(1).

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definition of willful applies to both Sections 312 and 503(b) of the Act,⁴ and the Commission has so interpreted the term in the Section 503(b) context.⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁷

A. Violation of Public Inspection File Requirements

4. Section 73.3527(a)(2) of the Rules requires non-commercial educational stations to maintain for public inspection, a file containing materials listed in that section.⁸ Section 73.3527(c)(1) of the Rules states that the file shall be available for public inspection at any time during regular business hours.⁹ Section 73.3527(e)(8)(i) of the Rules requires licensees to place in the public inspection file, for each calendar quarter, a list of programs that have provided the station’s most significant treatment of community issues during the preceding three month period.¹⁰ On October 28, 2011, in response to a request during normal business hours to inspect the public inspection file, Station WPRK failed to make available any copies of the station’s issues /programs lists after the year 2007. There was no evidence that Station WPRK maintained any issues/programs lists after 2007, and the station had no explanation for the missing items. Based on the evidence before us, we find that Rollins College apparently willfully and repeatedly violated Section 73.3527 of the Rules by failing to maintain a complete public inspection file and apparently willfully violated Section 73.3527 of the Rules by failing to make available a complete public inspection file.

B. Proposed Forfeiture and Reporting Requirement

5. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to maintain a complete public inspection file is \$10,000.¹¹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the

⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁵ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁸ 47 C.F.R. § 73.3527(a)(2).

⁹ 47 C.F.R. § 73.3527(c)(1).

¹⁰ 47 C.F.R. § 73.3527(e)(8)(i).

¹¹ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹² Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Rollins College is apparently liable for a total forfeiture of \$10,000.

6. We also direct Rollins College to submit a written statement signed under penalty of perjury, pursuant to Section 1.16 of the Rules,¹³ by an officer or director of Rollins College, stating that its maintaining issues/programs lists in its public inspection file. This statement must be provided to the Tampa Office at the address listed in paragraph 12, below, within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Rollins College is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 73.3527 of the Commission's rules.¹⁴

8. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Rollins College **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. **IT IS FURTHER ORDERED** that Rollins College **SHALL SUBMIT** a statement as described in paragraph 6 to the Tampa Office within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Tampa Office, 4010 W Boy Scout Blvd, Suite 425, Tampa, FL 33607. Rollins College shall also e-mail the written statement to SCR-Response@fcc.gov.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Rollins College will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure

¹² 47 U.S.C. § 503(b)(2)(E).

¹³ 47 C.F.R. § 1.16.

¹⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.3527.

¹⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.¹⁷ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Tampa Office, 4010 W Boy Scout Blvd, Suite 425, Tampa, FL 33607, and include the NAL/Acct. number referenced in the caption. Rollins College also shall e-mail the written response to SCR-Response@fcc.gov.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Rollins College at 1000 Holt Avenue, Box 2745, Winter Park, FL 32789-4499.

FEDERAL COMMUNICATIONS COMMISSION

Ralph Barlow
District Director,
Tampa Office
South Central Region
Enforcement Bureau

¹⁶ See 47 C.F.R. § 1.1914.

¹⁷ 47 C.F.R. §§ 1.16, 1.80(f)(3).



PUBLIC NOTICE

Federal Communications Commission
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DA 12-1177

Released: July 23, 2012

PUBLIC SAFETY AND HOMELAND SECURITY BUREAU SEEKS COMMENT ON REQUEST FOR WAIVER FILED BY THE TOWNSHIP OF WOODBRIDGE, NEW JERSEY TO OPERATE A TRUNKED PUBLIC SAFETY COMMUNICATIONS SYSTEM USING PART 90 AND PART 22 FREQUENCIES IN THE TELEVISION CHANNEL 19 (500-506 MHz) BAND

File No. 0004536973

Comment Date: August 7, 2012

The Public Safety and Homeland Security Bureau seeks comment on the application and waiver request, filed on December 16, 2010, by the Township of Woodbridge, New Jersey (Woodbridge, or the Township), through its Police Department.¹ Woodbridge seeks waiver relief, pursuant to Section 1.925 of the Commission's rules,² to use, for public safety communications purposes, "seven frequency pairs from the 500-506 MHz [TV Channel 19] band segment"³ located beyond 80 kilometers (50 miles) from Philadelphia, Pennsylvania. Woodbridge also seeks waiver relief because the Commission's rules designate two of the frequency pairs for Part 22 point-to-multipoint operations. Woodbridge requests waiver of Sections 20.9(a)(6), 22.621, 22.623(b), 22.625(b)(1), 90.305(a), and 90.307(d) of the Commission's rules.⁴ Woodbridge seeks to proceed with its request in light of recent developments involving the 470-512 MHz band (T-Band), which we summarize herein.⁵

¹ File No. 0004536973 (filed Dec. 12, 2010, amended July 13, 2011, July 18, 2011, January 18, 2012, April 10, 2012, and July 11, 2012), attachments entitled, "Application and Waiver Petition of Woodbridge Township, New Jersey" (Waiver Request); Supplemental Pleading" (dated Jan. 18, 2012) (Supplemental Pleading).

² See 47 C.F.R. § 1.925.

³ Waiver Request at 1. Woodbridge seeks Part 22 frequencies 500.1875, 503.1875, 500.2125, and 503.2125 MHz; and Part 90 frequencies 501.3000, 504.3000, 501.4000, 504.4000, 501.5750, 504.5750, 501.7750, 504.7750, 501.8750, and 504.8750 MHz.

⁴ *Id.* 47 C.F.R. §§ 20.9(a)(6), 22.621, 22.623(b), 22.625(b)(1), 90.305(a), 90.307(d). See Waiver Request at 1, Supplemental Pleading at 1-3. Woodbridge had requested a waiver of 47 C.F.R. § 90.305(b), *see id.*, but Woodbridge amended its application on July 18, 2011 to conform to this rule.

⁵ See File No. 0004536973, Letter from Captain Scott Kuzma, Commanding Officer, Information and Technology Systems, Woodbridge Police Department, to Mr. David Furth, Deputy Chief, Public Safety and Homeland Security Bureau (dated April 10, 2012) (Kuzma Letter); and attachment entitled, "Petition for Waiver of Woodbridge Township, New Jersey" (dated July 10, 2012) (T-Band Suspension Waiver).

The Township states that “[o]n December 5, 2008 the Commission granted Woodbridge’s request to be licensed on fifteen frequency pairs in the channel 20 television band (506-512 MHz).”⁶ The Township notes that the “frequencies are the foundation of Woodbridge’s new trunked land mobile system intended to serve police, fire and emergency services and other government responsibilities of Woodbridge and those of adjacent municipalities.”⁷ According to Woodbridge, “[t]he system was completed in late summer 2009” with an “approximate cost [of] \$10 million.”⁸

The Township states that “[d]uring system startup and optimization, intermittent interference was identified.”⁹ Woodbridge “retained technical experts to identify the type and strength of the interference” and found that “the source of the interference is the digital signal from television (TV) channel 20 station in Waterbury, Connecticut (WTXX).”¹⁰ The Township contends that “[t]he interference is attributed to ducting ...,” which “disables Woodbridge’s system for an unacceptable periods of time for police, fire and emergency response to rely on” because “[t]he network’s portable radios are unable to communicate back to the system.”¹¹ The Township’s “radio engineering consultant and Motorola, Inc. examined alternatives to filter or otherwise overcome the interference;” however the “effort was unsuccessful.”¹²

The instant application and waiver request represents “the second of two applications to remedy the [interference].”¹³ Woodbridge’s “first application and waiver request, to use frequencies within the television channel 16, was granted by the Commission on August 13, 2010 and is authorized under call sign WQMI704.”¹⁴ Woodbridge states that “[t]his second application will substitute frequencies within the 500-506 MHz band segment for the remaining channel 20 frequency pairs still licensed.”¹⁵ Woodbridge “reiterates its commitment to return the channel 20 frequencies to the Commission as soon as the replacement substitute frequencies are deployed and operating effectively.”¹⁶

Woodbridge argues that “use of frequencies in the 500-506 MHz band segment, when combined with the Commission’s authorization to use 482-488 MHz channels, will allow [the Township’s] investment to be preserved and critical improvements to emergency response obtained.”¹⁷ Woodbridge argues that “examination of the VHF, UHF, 470 MHz, and 800 MHz bands presents no alternatives.”¹⁸ Woodbridge states that “[c]hannels in the 700 MHz band were considered,” but “in addition to the challenge that there are more agencies seeking channels than capacity available and length of the review

⁶ Waiver Request at 2. See Township of Woodbridge, *Order*, 23 FCC Rcd 17406 (PSHSB PD 2008), and licenses for call signs WQJS363 and WQJS365.

⁷ Waiver Request at 2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.* On June 18, 2010, Station WTXX changed its call sign to Station WCCT-TV.

¹¹ Waiver Request at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2-3. See Township of Woodbridge, New Jersey, *Order*, 25 FCC Rcd 10917 (PSHSB PD 2010).

¹⁵ Waiver Request at 3.

¹⁶ *Id.*

¹⁷ Waiver Request at 7.

¹⁸ *Id.*

leading to licensing. Woodbridge's system was designed and deployed to use UHF spectrum."¹⁹ Woodbridge asserts that it "knows of no reasoned path to integrate, in a cost efficient manner, [into] its current infrastructure, 700 MHz frequencies."²⁰

The TV Channel 19 band is available for private land mobile radio service (PLMRS) entities, including public safety entities, in the Philadelphia, Pennsylvania urbanized area.²¹ Because the proposed frequencies are not available for use by PLMRS entities in the Northern New Jersey area, Woodbridge seeks a waiver of Section 90.305(a).²² This rule provides that base station transmitter sites must be located within 80 kilometers (50 miles) from the geographic center of an urbanized area listed in Section 90.303.²³ Woodbridge's base stations are located a maximum of 65.2 miles (104.9 kilometers) from the Philadelphia geographic center coordinates.²⁴ Woodbridge notes that "the Commission has granted waivers for numerous agencies and private licensees to operate land mobile operations within 500-506 MHz ... throughout NE New Jersey, NW Pennsylvania, and SE New York."²⁵ The Township argues that its proposed operations "will be a *de minimis* addition to the current 500-506 MHz environment."²⁶ In addition, because Woodbridge proposes to operate in an area less than ninety miles from the adjacent TV Channel 18 Station WMBC, Montclair, New Jersey, it requests a waiver of Section 90.307(d).²⁷ Woodbridge entered into a Memorandum of Understanding with the licensee of Station WMBC, Mountain Broadcasting Corporation.²⁸

Regarding the four Part 22 frequencies,²⁹ Woodbridge seeks waiver of four rules. Section 22.621 provides that the frequencies are allocated for assignment to transmitters utilized within point-to-multipoint systems that support transmitters that provide public mobile service.³⁰ Woodbridge argues that since co-channel public safety licensees Nassau County Police Department, New York (Nassau) and the County of Burlington, New Jersey (Burlington) operate on the frequencies, "no use of these channels is possible under the provisions of Section 22.621."³¹ Moreover, The Township obtained conditional

¹⁹ *Id.* As we noted above, Woodbridge is operating on TV Channel 20 band frequencies.

²⁰ Waiver Request at 7.

²¹ See 47 C.F.R. §§ 90.303, 90.305(a).

²² See Waiver Request at 5.

²³ See 47 C.F.R. §§ 90.303, 90.305(a). While these rules apply to the Part 90 frequencies, Woodbridge also would need a waiver of 47 C.F.R. § 22.625(a)(1) to use the Part 22 frequencies at locations more than 80 kilometers from Philadelphia.

²⁴ See Waiver Request at 5.

²⁵ Waiver Request at 4-5.

²⁶ *Id.* at 5.

²⁷ See *id.* at 6. See also 47 C.F.R. § 90.307(d). A land mobile base station which has associated mobile units must be separated from a protected adjacent channel television station by a minimum distance of 145 kilometers (90 miles). *Id.*

²⁸ See Waiver Request, Attachment 2. Memorandum of Understanding between the Township of Woodbridge, New Jersey, and Mountain Broadcasting Corporation (May 11, 2010).

²⁹ See *supra* n.3.

³⁰ 47 C.F.R. § 22.621.

³¹ Supplemental Pleading at 1-2.

concurrences from Nassau and Burlington Counties.³² Next, Section 20.9(a)(6) provides that Part 22 frequencies shall be regulated as a commercial mobile radio service.³³ Woodbridge states that “[i]f the Commission determines that Woodbridge’s use of the frequencies for public safety communications is appropriate, the purpose of section 20.9(a)(6), that Woodbridge’s use be accompanied by common carriage responsibilities, would not be served” and “would undermine effective public safety communications.”³⁴ Next, Section 22.623(b) requires that the channels may be assigned in an unpaired configuration only to control base stations in the public mobile service.³⁵ Woodbridge states that “[t]he purpose of Rule 22.623(b), to format how frequencies are assigned and deployed, would not be served as it is directed to point to multi point operation services under Part 22” rather than “the public safety service, where channel pairs for base and mobile operations is the norm.”³⁶ Finally, Section 22.625(b)(1) requires that control transmitter locations must be within 80 kilometers (50 miles) of the designated location, in this case, Philadelphia.³⁷ Woodbridge states that its “analysis [provided in the original Waiver Request], and that the concurrence of the relevant TV broadcast station has been obtained, indicates that while the purpose of the rule is preserved, the more relevant analysis is under Part 90 of the Commission’s rules.”³⁸

On April 10, 2012, Woodbridge filed a letter³⁹ to further describe its request in light of the Middle Class Tax Relief and Job Creation Act of 2012,⁴⁰ which President Barack Obama signed into law on February 22, 2012. Section 6103 of the Spectrum Act provides that, not later than nine years after the date of enactment, the Commission shall “reallocate the spectrum in the 470-512 MHz band ... currently used by public safety eligibles”⁴¹ The Act instructs the Commission to “begin a system of competitive bidding under Section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) to grant new initial licenses for the use of the spectrum.”⁴² It also provides that “relocation of public safety entities from the T-Band Spectrum” shall be completed not later than two years after completion of the system of competitive bidding.”⁴³

Woodbridge states that “[a]ll infrastructure and subscriber equipment supporting the system have been deployed.”⁴⁴ Woodbridge states that “[m]igration to the proposed channel 19 frequency pairs

³² See Waiver Request, Attachment 3. Letter from Lieutenant Thomas M. Golder, Nassau County Police Department to Federal Communications Commission (dated July 13, 2010); File No. 0004536973, attached Letter from Richard K. Dreby, Director, Public Safety Services, County of Burlington, to Federal Communications Commission (dated June 23, 2010).

³³ 47 C.F.R. § 20.9(a)(6).

³⁴ Supplemental Pleading at 2.

³⁵ 47 C.F.R. § 22.623(b).

³⁶ Supplemental Pleading at 2.

³⁷ 47 C.F.R. § 22.625(b)(1).

³⁸ Supplemental Pleading at 2.

³⁹ See Kuzma Letter.

⁴⁰ See Pub. L. No. 112-96, 126 Stat. 156 (2012) (Spectrum Act).

⁴¹ *Id.*, § 6103(a).

⁴² *Id.*

⁴³ *Id.*, § 6103(b), (c).

⁴⁴ See Kuzma Letter at 2.

requires only software and conformance adjustments to the infrastructure and subscriber equipment, the cost of which has been authorized and funded.”⁴⁵ Woodbridge contends that its “proposal, including returning all channel 20 frequency pairs to the Commission, will not encroach upon the Commission reallocating the 470-512 MHz band to commercial services or add costs to the relocation process.”⁴⁶ Woodbridge states, “Public Law 112-96 does not preclude modifications to public safety licensees in the 470-512 MHz band segment.”⁴⁷

On April 26, 2012, the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau (Bureaus) issued a public notice announcing a limited suspension of the acceptance and processing of certain applications for Part 22 and Part 90 services operating in the 470-512 MHz spectrum band (T-Band)⁴⁸ that could alter the spectrum landscape. The purpose of the suspension is to stabilize the spectral environment while the Commission considers issues surrounding future use of the T-Band and implementation of the Spectrum Act.⁴⁹ Specifically, the Bureaus will not accept or process applications for applications that seek to modify existing licenses by, *inter alia*, changing frequencies,⁵⁰ which affects Woodbridge’s application. The *Suspension Notice* provides that applicants may have recourse to the waiver provisions in Section 1.925 to request an exception to the filing and processing suspension.⁵¹

On July 10, 2012, Woodbridge filed a request for waiver of the *Suspension Notice*.⁵² Woodbridge details two ducting interference incidents on June 12, and July 3, 2012, that disabled the public safety radio services operating on the channel 20 frequencies for most of the day.⁵³ The Township notes that “[e]ach circumstance had a profound and negative effective on emergency response and all government services in Woodbridge and the adjoining municipality the system now serves, and engages the Township’s senior leadership at each occurrence.”⁵⁴ Woodbridge reiterates that it has no reasonable alternative and argues that “channel 19 frequencies are the only path to resolve the difficult and dangerous environment.”⁵⁵ Moreover, Woodbridge argues, “[b]y exchanging the channel 20 frequencies, Woodbridge gains no leverage in a transition and relocation from the 470-512 MHz band.”⁵⁶ Woodbridge continues, “[y]et, its emergency response responsibilities, and that of adjacent municipalities, will be meaningfully improved because ducting will no longer disable the system’s portable and mobile radios.”⁵⁷

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

⁴⁸ Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Suspend the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (T-Band) Spectrum, *Public Notice*, 27 FCC Rcd 4218 (WTB/PSHSB 2012) (*Suspension Notice*).

⁴⁹ *Id.* at 1-2.

⁵⁰ *See id.* at 2.

⁵¹ *Id.*, note 4.

⁵² *See Suspension Waiver*.

⁵³ *See id.* at 4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 4-5.

The Township states that the channel exchange “will correct an unacceptable environment endangering the public and responding officers.”⁵⁸

Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this *Public Notice*. All comments should reference the subject Waiver Request and the DA number indicated on this *Public Notice*. Parties may file statements and replies: (1) electronically by accessing the applicant’s file number(s) in the Commission’s Universal Service Licensing System (ULS).⁵⁹ or (2) by filing paper copies.

- Electronic Filers: Pleadings may be submitted electronically as follows:

From the ULS website at <http://wireless.fcc.gov/uls/>, begin the process of submitting a pleading by clicking on the “ULS Pleadings” link in the menu on the lower left side of the ULS web page. The link will take you to the “*Pleading Information*” screen for “Non-docketed Pleadings” where you select “Reply” in the drop-down window for the type of pleading and then enter the pleadings filer information. Completion of the contact information is optional. Upon completion of this screen, please note the instructions for the filing: “*Pleadings must be dated and must include a signature, in this instance an electronic signature, and the address and phone number of the signing party.*”⁶⁰ Click on “CONTINUE.”

The second step is to complete the *File Numbers/Call Signs* screen. Click if the pleading pertains to a File Number or Call Sign and enter the File Number or Call Sign. Please note that you must enter a File Number or Call Sign to continue. If the pleading pertains to multiple applications or licenses, you must enter each File Number or Call Sign as appropriate. After clicking the “SUBMIT” button, the screen will update to show all the File Numbers/Call Signs associated with the pleading. At this time, you may delete selected File Numbers/Call Signs from the page before continuing.

The third step is to complete the *Attach File* screen to attach the pleading document. Use the drop down box to select Pleading or Confidential Pleading. The “BROWSE” button opens a file upload window where you will locate and select your pleading file. The Description field allows you to enter a brief description for the pleading. Click the “ADD ATTACHMENT” button to upload your pleading. You may submit up to thirty files for each pleading but each file must be smaller than 10 MB in size. You also have the opportunity to delete any selected file from the pleading.

Finally, to complete your electronic pleading submission, click on the “SUBMIT PLEADING” button and the *Confirmation* screen will be displayed. The *Confirmation* screen will display your Confirmation Number as well as your entered pleadings information. You may print this page for your records by selecting the Print Page link at the top of the page and have the option of submitting another pleading or returning to the ULS website by selecting a link at the bottom of the page.

The ULS Application and License Search results will display pleadings under the ADMIN tab when a comment has been filed. Users can view the pleading by clicking on the link for the specific comment in the Description field. The general public will not be able to view confidential pleadings.

⁵⁸ *Id.* at 5.

⁵⁹ See “Wireless Telecommunications Bureau Enhances the Commission’s Universal Licensing System to Implement Electronic Filing for Pleadings,” *Public Notice*, 21 FCC Rcd 424 (WTB 2006). See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-125A1.pdf.

⁶⁰ See 47 C.F.R. Part 1.

For additional information or assistance on how to file a comment or other relevant pleading, you may visit the Web at <http://esupport.fcc.gov>. You may also call the FCC ULS Customer Support Center at (877) 480-3201 and select option 2, or (888) 225-5322 and select Option 2, or (717) 338-2888. For TTY, please call (717) 338-2824. Assistance from the FCC ULS Customer Support Center is available between the hours of 8 a.m. to 6:00 p.m. Eastern Time, Monday through Friday (except Federal holidays). To provide quality service and ensure security, all telephone calls to FCC ULS Customer Support Center are recorded.

- **Paper Filers:** Parties who choose to file by paper must submit an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours at this location are 8:00 a.m. to 7:00 p.m. **PLEASE NOTE:** The Commission's former filing location at 236 Massachusetts Avenue, NE is permanently closed.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

The application(s), waiver request, and comments can be accessed electronically via the Commission's Universal Licensing System, <http://wireless.fcc.gov/uls>. The full text of the Waiver Request and comments will be available for inspection and duplication during regular business hours in the FCC Reference Information Center (RIC) of the Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, DC 20554. Copies may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554. Customers may contact BCPI through its web site, <http://www.bcpweb.com>, by email at fcc@bcpweb.com, by phone at (202) 488-5300 or (800) 378-3160, or by facsimile at (202) 488-5563. For further information regarding the public reference file for this waiver request, contact Lisa Williams, RIC, (202) 418-1352.

Because of the policy implications and potential impact of this proceeding on persons not party to these Applications, it is in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules. See Sections 1.1200(a) and 1.1206 of the Commission's rules, 47 C.F.R. §§ 1.1200(a) and 1.1206. Therefore, subsequent to the release of this *Public Notice*, *ex parte* presentations that are made with respect to the issues involved in the subject waiver request will be allowed, but must be disclosed in accordance with the requirements of Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

For further information, contact Mr. David Siehl of the Policy and Licensing Division, Public Safety and Homeland Security Bureau at (202) 418-1313 (voice), (202) 418-7233 (tty), or via e-mail to David.Siehl@fcc.gov.

By the Deputy Chief, Public Safety and Homeland Security Bureau.

- FCC -

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Siembra Fertil P.R. Inc.	)	File No.: EB-FIELDSCR-12-00001328
Licensee of Station WJDZ(FM)	)	NAL/Acct. No.: 201232680004
Pastillo, Puerto Rico	)	FRN: 0016447872
Facility ID#: 83299)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 26, 2012

Released: July 26, 2012

By the Resident Agent, San Juan Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Siembra Fertil P.R. Inc. (Siembra), licensee of Station WJDZ(FM), located in Pastillo, Puerto Rico, apparently willfully and repeatedly violated Section 73.1125(a) of the Commission's rules (Rules)¹ by failing to staff fully Station WJDZ's main studio during normal business hours. We conclude that Siembra is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000). In addition, no later than thirty (30) calendar days from the date of this NAL, we direct Siembra to submit a statement signed under penalty of perjury that it is maintaining a full-time management and staff presence at Station WJDZ's main studio.

II. BACKGROUND

2. On March 1, 2012, an agent from the Enforcement Bureau's San Juan Office (San Juan Office) attempted to inspect Station WJDZ's main studio at 11:31 A.M. and found the main studio unattended. The agent telephoned the station's manager, who stated a technician would be able to meet him at the main studio at 1:30 P.M. The agent returned to the main studio at 1:25 P.M. and conducted the inspection with the technician. The technician stated that he is the only person who works at the main studio, as the station manager works in Toa Baja, Puerto Rico, a location more than an hour and a half drive from the main studio. He also stated that his hours are 6:00 A.M. to 11:30 A.M. and 12:30 P.M. to 3:00 P.M., Monday to Friday.

3. On March 5, 2012, an agent from the San Juan Office attempted to inspect Station WJDZ's main studio at 12:05 P.M. and 2:00 P.M., but found the station unattended and locked. The agent returned on March 7 and 16, 2012 at 10:15 A.M. and 2:02 P.M. respectively, and again found the station unattended and locked.

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended (Act) provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license,

¹ 47 C.F.R. § 17.57.

or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.² Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁴ and the Commission has so interpreted the term in the Section 503(b) context.⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁷

A. Failure to Maintain Management and Staff Presence at Station WJDZ Main Studio

5. Section 73.1125(a) of the Rules requires broadcast stations to maintain a main studio.⁸ The Commission has interpreted Section 73.1125 (also known as the Main Studio Rule) to require, among other things, that a licensee maintain a “meaningful management and staff presence” at its main studio.⁹ Specifically, the Commission has found that a main studio “must, at a minimum, maintain full-time managerial and full-time staff personnel.”¹⁰ Although management personnel need not be “chained to their desks” during normal business hours, they must “report to work at the main studio on a daily basis, spend a substantial amount of time there and...use the studio as a ‘home base.’”¹¹ On March 1, 2012, an agent from the San Juan Office found Station WJDZ’s main studio unattended in the morning. The agent interviewed a technician later in the day, who claimed he is the only person who works at the main studio,

² 47 U.S.C. § 503(b).

³ 47 U.S.C. § 312(f)(1).

⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁵ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁸ 47 C.F.R. § 73.1125.

⁹ *Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026 (1988) (*Main Studio and Program Origination Rules*), *erratum issued*, 3 FCC Rcd 5717 (1988) (correcting language in n.29).

¹⁰ See *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615, 3616 & n.2 (1991) (noting that, “This is not to say that the same staff person and manager must be assigned full-time to the main studio. Rather, there must be management and staff presence on a full-time basis during normal business hours to be considered ‘meaningful.’”), *clarified*, 7 FCC Rcd 6800 (1992) (*Jones Eastern II*). See also *Birach Broadcasting Corporation*, Notice of Apparent Liability, 25 FCC Rcd 2635 (Enf. Bur. 2010).

¹¹ *Jones Eastern II*, 7 FCC Rcd at 6802.

as his supervisor worked at another distant location. On March 5, 7, and 16, 2012, an agent from the San Juan Office attempted to inspect Station WJDZ's main studio during the hours when it is allegedly staffed and found the main studio unattended and locked. Thus, based on the evidence before us, we find that Siembra apparently willfully and repeatedly violated Section 73.1125(a) of the Rules by failing to maintain a full-time managerial and staff presence at Station WJDZ's main studio.

B. Proposed Forfeiture and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for violation of a main studio rule is \$7,000.¹² In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require.¹³ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Siembra is apparently liable for a forfeiture in the amount of \$7,000.

7. We direct Siembra to submit a written statement, pursuant to Section 1.16 of the Rules,¹⁴ signed under penalty of perjury that the licensee is maintaining a full-time management and staff presence at the Station WJDZ main studio. This statement must be provided to the San Juan Office at the address listed in paragraph 13 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314 and 1.80 of the Commission's rules, Siembra Fertil P.R. Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seven thousand dollars (\$7,000) for violations of Section 73.1125(a) of the Commission's rules.¹⁵

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Siembra Fertil P.R. Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Siembra Fertil P.R. Inc. **SHALL SUBMIT** a statement as described in paragraph 7 to the San Juan Office within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, San Juan Office, U.S. Federal Building, Room 762, Hato Rey, PR 00918. Siembra Fertil P.R. Inc. shall also e-mail the written statement to SCR-Response@fcc.gov.

¹² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*. Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. §1.80.

¹³ 47 U.S.C. § 503(b)(2)(E).

¹⁴ 47 C.F.R. § 1.16.

¹⁵ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.1125(a).

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Siembra Fertil P.R. Inc. will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁶ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁷ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.¹⁸ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, San Juan Office, U.S. Federal Building, Room 762, Hato Rey, PR 00918 and include the NAL/Acct. No. referenced in the caption. Siembra San Eladio, Inc. also shall e-mail the written response to SCR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁷ See 47 C.F.R. § 1.1914.

¹⁸ 47 C.F.R. §§ 1.16, 1.80(f)(3).

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail, to Siembra Fertil P.R. Inc. at PO Box 50101, Toa Baja, PR 00778.

FEDERAL COMMUNICATIONS COMMISSION

William Berry
Resident Agent
San Juan Office
South Central Region
Enforcement Bureau

In the Matter of)	
)	
OHIO, STATE OF)	File No. 0005005421
)	
Request for Waiver of the 800 MHz Inter-category)	
Sharing Freeze and the Wave 4 Application)	
Freeze)	

“enhance their daily operational capabilities as well as [to] improve interoperability with the State and surrounding local agencies.”⁷ Even though the additional load to MARCS would only be 150-200 radios, Ohio indicates that it conducted an evaluation of the North Canton region and found that MARCS is at present operating near maximum capacity in the area.⁸ Therefore, if North Canton were to join MARCS currently, the system would become “dangerously overloaded” and there would be “potentially serious adverse effects on public safety operational and interoperable communications.”⁹

3. As a result, Ohio states it requires more capacity in the form of additional radio frequencies in order to allow North Canton to join MARCS.¹⁰ Ohio claims, however, that no frequencies in the Public Safety Pool are available due to “numerous existing 800 MHz systems already operating in the area.”¹¹ To alleviate the channel shortage, Staley Technologies, Inc., a service provider in the North Canton area, has offered to donate two SMR frequency pairs to allow Ohio to expand MARCS to include North Canton.¹² Ohio, however, needs a waiver of the eligibility requirements established by the Commission to license channels from the SMR category.¹³ Absent such a waiver, Ohio, a public safety entity, is ineligible to license these channels.

4. Ohio seeks to license the SMR frequency pairs under the criteria established for inter-category sharing whereby the Commission allows an applicant to license channels outside its pool category, provided that the applicant demonstrates that no channels are available for licensing in the pool category for which it is eligible.¹⁴ The Wireless Telecommunications Bureau, however, has placed a freeze on the filing of new applications for inter-category sharing.¹⁵ Ohio seeks a waiver of the freeze.

5. In support of its waiver request, Ohio includes a letter from a frequency coordinator certifying that no Public Safety Pool frequencies are available for the proposed operation in Canton.¹⁶ Ohio also includes a letter of support from the 800 MHz Regional Planning Committee for Region 33.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² See Letter dated August 1, 2011, from Kerry Staley, Staley Technologies, Inc., to Federal Communications Commission (relinquishing two frequencies to Ohio, 859.5875 and 860.5875 MHz).

¹³ The PLMR frequencies in the 800 MHz band are divided into the following categories: (1) Specialized Mobile Radio (SMR), (2) Public Safety, (3) Business, (4) Industrial/Land and Transportation (I/LT) and (5) General. See 47 C.F.R. §§ 90.615, 90.617.

¹⁴ See 47 C.F.R. § 90.621(e).

¹⁵ Inter-category Sharing Waiver Request at 1. See also Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350, *aff'd on recon.*, 11 FCC Rcd 1452 (WTB 1995).

¹⁶ See Letter dated June 12, 2012, from Judy Stone, Association of Public-Safety Communications Officials, Inc. (APCO), to the Federal Communications Commission (APCO Concurrence): see also APCO Frequency Search Results attached to FCC File No. 0005005421.

6. Ohio also seeks a waiver of the freeze the Public Safety and Homeland Security Bureau (PSHSB) imposed on new applications along the Canadian border.¹⁸ PSHSB froze the filing of new applications in the National Public Safety Planning Advisory Committee (NPSPAC) regions along the Canadian border to preserve the spectral landscape while reconfiguration of the 800 MHz band progresses.¹⁹ In support of its request for waiver of the application freeze, Ohio includes a letter from the 800 MHz Transition Administrator (TA) stating that Ohio's application will not affect band reconfiguration along the border with Canada.²⁰

7. Finally, Ohio's proposed operation on the two SMR frequency pairs at the Canton site would impermissibly short-space "numerous" Sprint Nextel Corporation (Sprint) SMR sites.²¹ As a result, Ohio requires either (1) a waiver of the Commission's short spacing rules²² or (2) Sprint's concurrence to the proposed short-spacing.²³ Sprint concurs in a letter attached to Ohio's application provided Ohio (1) notifies Sprint 60 days prior to activating the new channels²⁴ and (2) submits an updated 800 MHz Expansion Band Election Form to the TA reflecting the new call sign for the subject frequencies.²⁵

(Continued from previous page)

¹⁷ See Letter dated July 8, 2011, from Paul M. Mayer, Region 33 (Ohio) 800 MHz Planning Committee, to the State of Ohio.

¹⁸ Application Freeze Waiver Request at 1.

¹⁹ See Public Safety and Homeland Security Bureau Extends 800 MHz Application Freeze for Wave 4 Border Area NPSPAC and Non-NPSAPC Licensees Along the U.S.-Canada Border, *Public Notice*, 27 FCC Rcd 4037 (PSHSB 2012) (*Canada Border Freeze PN*).

²⁰ See Letter dated October 21, 2011 from Brett Haan, 800 MHz Transition Administrator, to the State of Ohio (TA Concurrence).

²¹ See Letter dated December 20, 2011, from Robin J. Cohen, Sprint Nextel to the Federal Communications Commission (Sprint Letter). Sprint states that it "is the Economic Area (EA) licensee for EA 51, 52, and 55, Block R, which includes these frequencies south of the Canton, Ohio area in the non-Canadian border region covered by these EAs." *Id.* at 1.

²² Section 90.621(b)(4) provides that applicants for facilities located at distances less than those prescribed in the short-spacing table must request a waiver and submit with the waiver request an interference analysis showing that existing co-channel stations will receive the same or greater interference protection than that provided in the table. 47 C.F.R. § 90.621(b)(4).

²³ The separation between co-channel systems may be less than the separation specified in the short-spacing table if an applicant submits with its application letters of concurrence indicating that the applicant and each short-spaced co-channel licensee agree to accept any interference resulting from the reduced separation. 47 C.F.R. § 90.621(b)(5).

²⁴ See Sprint Letter at 1-2.

²⁵ See *id.* at 2. SMR frequency 860.5875 MHz is located in the Expansion Band (815-816 MHz/860-861 MHz). As part of 800 MHz rebanding, public safety entities could elect to remain in the Expansion Band or relocate below 815 MHz. See Public Safety and Homeland Security Bureau Clarifies the Rights of 800 MHz Public Safety Licensees Electing to Remain in the 800 MHz Expansion Band, *Public Notice*, 22 FCC Rcd 6803 (PSHSB 2007).

III. DISCUSSION

8. As an initial matter, we note that Section 90.621(e) of the Commission's rules²⁶ does not permit inter-category sharing of SMR frequencies.²⁷ Therefore we deny Ohio's request for waiver of the freeze on inter-category sharing.²⁸ On our own motion, however, we treat Ohio's filing as a request for waiver of the SMR eligibility rule in Section 90.617(d).²⁹

9. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and where a grant of the requested waiver would be in the public interest;³⁰ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³¹ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.³²

10. We find that the underlying purpose of Section 90.617(d) of the Commission's rules would not be served by strict application of the rule here. Section 90.617(d) specifically states that the channels listed in that subsection are available only to applicants in the SMR category. The waiver sought by Ohio would enable it to use SMR spectrum to improve public safety communications. When the Commission adopted Section 90.617(d) of the Rules, "it sought to avoid a potential scarcity of radio frequencies for Private Land Mobile Radio (PLMR) use by stopping the then prevailing practice of incorporating Business and I/LT channels into SMR systems."³³

11. Here, however, a public safety licensee seeks to gain access to a channel in the SMR category where no public safety channels are available. Under similar circumstances, the Wireless Telecommunications Bureau previously granted Ohio a waiver of the General Category freeze, Section 90.617(d), and other rules, to license SMR spectrum that was essential to MARCS' implementation at the time.³⁴ Further, we note that Staley Technologies and Sprint, the EA licensee, have both agreed to

²⁶ 47 C.F.R. § 90.621(e) ("[f]requencies in the 809–817/854–862 MHz bands listed as available for eligibles in the Public Safety and Business/Industrial/and Transportation Categories are available for inter-category sharing").

²⁷ Under Section 90.617(d) Ohio's requested channels are part of the SMR Category available after January 21, 2005, for site-based licensing. 47 C.F.R. § 90.617(d) Table 4B.

²⁸ See *American Electric Power Service, Memorandum Opinion and Order*, 22 FCC Rcd 4176, 4179 ¶ 7 (WTB 2007) (denying, without prejudice, applicant's request for waiver of the intercategory sharing freeze to license an SMR frequency because Section 90.621(e) does not apply to SMR spectrum).

²⁹ 47 C.F.R. § 90.617(d).

³⁰ See 47 C.F.R. § 1.925(b)(3)(i).

³¹ See 47 C.F.R. § 1.925(b)(3)(ii).

³² See *WALT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)).

³³ See *Metropolitan Transit Authority of Harris County, Texas, Order*, 20 FCC Rcd 12011, 12012 ¶ 4 (WTB 2005).

³⁴ See *State of Ohio, Memorandum Opinion and Order*, 17 FCC Rcd 439 (WTB 2002). The General Category freeze was intended to prevent the filing of new applications for channels in order to preserve the licensing landscape of the General Category spectrum so that the Commission could implement its new licensing approach (continued....)

accommodate Ohio's proposed operations.³⁵ Thus, a waiver of Section 90.617(d) of the Commission's rules does not undermine the underlying purpose of the SMR eligibility rules.

12. We also find that granting the waiver would be in the public interest. Ohio, a public safety entity, has demonstrated that there are no 800 MHz public safety channels available for its use, but that it has identified two SMR frequencies that could be used at its proposed site in Canton, Ohio.³⁶ In support of its contention regarding lack of an available public safety channel, Ohio includes letters from APCO and the 800 MHz Regional Planning Committee for Region 33.³⁷ Ohio claims that MARCS is operating near maximum capacity in the North Canton region and that the two SMR frequencies are necessary to provide improved public safety services there.³⁸

13. Ohio has also met the standards for grant of a waiver of the Wave 4 application freeze to enable Ohio to make use of the SMR channels within the Canada border region. The Wave 4 application freeze was established to maintain a stable spectrum environment during 800 MHz rebanding and to minimize adverse effects on incumbent public safety licensees that demonstrate a legitimate need for an exception to the freeze.³⁹ Ohio seeks to address capacity constraints by making use of these SMR channels. We are mindful of the operational needs of public safety licensees during 800 MHz rebanding and that denial of Ohio's waiver request could unduly delay Ohio and North Canton's system implementation plans.⁴⁰ Further, the TA concurs that Ohio's proposal will not impact 800 MHz rebanding.⁴¹ Accordingly, we grant Ohio's request for waiver of the Wave 4 application freeze.

14. Finally, we find that Ohio does not require a waiver of the Commission's "interleaved spectrum Orders." As part of rebanding, spectrum vacated by licensees relocating to the Enhanced SMR (ESMR) band above 817/862 MHz will become available to public safety and critical infrastructure industry entities.⁴² We analyzed Ohio's request and determined that its use of the subject SMR

(Continued from previous page)

for the spectrum effectively. *Id.* at 448-49 ¶ 18. We also note that Sprint filed a Petition for Stay and Reconsideration of the Ohio Order. On July 24, 2012, Sprint withdrew its Petition for Reconsideration of this Order and noted that the Stay Request was dismissed in April 2002. See Sprint Nextel Request for Withdrawal of Petition for Reconsideration (dated July 24, 2012) *re* WPVR872.

³⁵ See, e.g., County of Mecklenburg, *Memorandum Opinion and Order*, 17 FCC Rcd 15608, 15611-12 ¶¶ 9-10 (WTB 2002) (granting a public safety licensee a waiver of the General Category freeze, Section 90.617(d) and other rules, to permit public safety agency's licensing of SMR spectrum in light of the EA licensee's support).

³⁶ Frequency 859.5875 MHz is located in the 800 MHz Interleaved Band and frequency 860.5875 MHz is located in the 800 MHz Expansion Band. The Interleaved Band consists of the 809-815 MHz/854-860 MHz segment and the Expansion Band consists of the 815-816 MHz/860-861 MHz segment of the 800 MHz band. See *Improving Public Safety Communications in the 800 MHz Band, Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15053-54 ¶¶ 154-156 (2004).

³⁷ See APCO Concurrence.

³⁸ See Inter-category Sharing Waiver Request at 1.

³⁹ See *Canada Border Freeze PN*.

⁴⁰ See County of Tompkins, New York, *Order*, 22 FCC Rcd 10215 (PSHSB 2007); County of Tuscarawas, Ohio, *Order*, 22 FCC Rcd 1717 (PSHSB 2007).

⁴¹ See TA Concurrence.

⁴² See 47 C.F.R. § 90.617(g).

frequencies will result in only a *de minimis* extension of Staley Technologies' currently licensed interference contour on the requested frequencies.⁴³ Therefore, we conclude that Ohio's use of these SMR frequencies will have no significant effect on the future availability of vacated spectrum to other public safety eligible entities.

15. *Conditions.* As noted above, Sprint conditions its short-spacing concurrence on (1) Ohio providing Sprint 60-day notice prior to commencing operations on the SMR channels and (2) Ohio submitting an updated election form to the TA.⁴⁴ We agree that the conditions should be imposed. First, it is reasonable to require Ohio to provide Sprint with 60 days notice prior to commencing operations on the SMR channels at issue in order for Sprint to take all necessary precautions to avoid interference. Second, Sprint notes that, on December 1, 2011, Ohio submitted an 800 MHz Expansion Band Election Form to the TA,⁴⁵ and that the TA required Ohio to resubmit the form updating the new call sign when it is issued.⁴⁶ Consequently, we also condition Ohio's grant on it updating its Expansion Band election form with the TA.

IV. ORDERING CLAUSES

16. For the reasons discussed herein, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.925, the State of Ohio's request for waiver of the freeze on inter-category sharing dated December 27, 2011 IS DENIED to the extent Ohio seeks relief under Section 90.621.

17. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.925 and 90.617(d) of the Commission's Rules, 47 C.F.R. §§ 1.925 and 90.617(d), the State of Ohio's waiver request of the Wave 4 application freeze IS GRANTED WITH CONDITIONS outlined in Paragraph 15.

18. IT IS FURTHER ORDERED that the State of Ohio's application, FCC File No. 0005005421, SHALL BE PROCESSED in accordance with this *Order*.

19. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's Rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief
Policy and Licensing Division
Public Safety and Homeland Security Bureau

⁴³ We compared the 22 dBu F(50,10) contour of Ohio's proposed operation to the 22 dBu F(50,10) contour of Staley Technologies' Station WPEF809. The contour of Station WPEF809 was calculated using a maximum ERP of 1000 watts.

⁴⁴ See Sprint Letter at 1-2.

⁴⁵ See *id.* at 2 n.2.

⁴⁶ See *id.*



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-6322

DA 12-1180
Released: July 24, 2012

CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR EXPEDITED DECLARATORY RULING FROM GROUPME, INC.

CG Docket No. 02-278

Comment Date: August 30, 2012
Reply Comment Date: September 10, 2012

With this Public Notice, we seek comment on a Petition for Declaratory ruling filed by GroupMe, Inc./Skype Communications S.A.R.L. (GroupMe)¹ seeking clarification of two issues arising under the Telephone Consumer Protection Act (TCPA)² and Section 64.1200 of the Commission's rules.³ First, GroupMe asks the Commission to clarify the meaning of the terms "automatic telephone dialing system" (ATDS) and "capacity," as used in 47 U.S.C. § 227(a)(1).⁴ Second, GroupMe asks the Commission to clarify that "for non-telemarketing, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the called party."⁵ GroupMe claims that these clarifications are needed to address the status of these technologies and services under the statute and implementing regulations.⁶

According to its petition, GroupMe provides a free group text messaging service for groups of up to 25 members.⁷ GroupMe allows users to communicate either over their standard text messaging service or by using the GroupMe app, which uses a data connection and avoids texting fees.⁸

¹ See *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (*Petition*) (noting that several companies including GroupMe are the subject of class action lawsuits based on the TCPA's definition of autodialer and classifications of group text-based services); see also Letters from Ronald W. Del Sesto, Jr., Counsel for GroupMe, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed July 18 and 20, 2012).

² Codified as 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

⁴ *Petition* at 14.

⁵ *Id.* at 18.

⁶ *Id.* at 2.

⁷ *Id.* at 5.

⁸ *Id.* at 4.

Pursuant to sections 1.415 and 1.419 of the Commission's rules,⁹ interested parties may file comments and reply comments on or before the respective dates indicated on the first page of this Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁰ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission

⁹ 47 C.F.R. §§ 1.415, 1.419.

¹⁰ 47 C.F.R. §§ 1.1200 *et seq.*

staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: B. Lynn Follansbee Ratnavale, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 202-418-1514, and lynn.ratnavale@fcc.gov.

-FCC-



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1181
Release Date: July 25, 2012

WIRELINE COMPETITION BUREAU SEEKS COMMENT ON WINDSTREAM COMMUNICATIONS PETITION FOR WAIVER OF CERTAIN HIGH-COST UNIVERSAL SERVICE RULES

WC Docket Nos. 10-90, 05-337

Comment Date: August 24, 2012
Reply Comment Date: September 10, 2012

The Wireline Competition Bureau seeks comment on a petition filed by Windstream Communications for a waiver of certain portions of section 54.312(b) of the Commission's rules, which, among other things, provides that a recipient of Connect America Fund Phase I incremental support must deploy broadband to one unserved location, as shown on the then-current National Broadband Map, for every \$775 of incremental support the recipient accepts.¹ First, Windstream seeks a waiver of the requirement to connect to one unserved location for every \$775 in incremental support it receives.² Second, Windstream seeks a waiver so that it might use Connect America Fund Phase I incremental support to deploy second-mile fiber.³

Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments or reply comments on or before the dates indicated above.⁴ Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).⁵

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

¹ Windstream Election and Petition for Waiver, WC Docket No. 10-90 et al. (filed July 24, 2012) (Petition); *see also* *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order and FNPRM*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011); 47 C.F.R. § 54.312(b).

² Petition at 11.

³ Petition at 12.

⁴ 47 C.F.R. §§ 1.415, 1.419.

⁵ *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

- (1) Joseph C. Cavender, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-B431, Washington, D.C. 20554; e-mail: Joseph.Cavender@fcc.gov; and
- (2) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, D.C. 20554; e-mail: Charles.Tyler@fcc.gov.

The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁶ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing

⁶ 47 C.F.R. §§ 1.1200 *et seq.*

oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, please contact Joseph Cavender, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418-7400 or TTY (202) 418-0484.

- FCC -

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.	)	File No.: EB-FIELDWR-12-00002388
	)	NAL/Acct. No.: 201232800004
Licensee of Station KMLD(FM) and	)	FRN: 0008230559
Station WLP722	)	Facility ID No.: 11927
Casper, Wyoming)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 25, 2012**Released: July 26, 2012**

By the District Director, Denver Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Station KMLD(FM) in Casper, Wyoming, apparently willfully and repeatedly violated Section 1.903(a) of the Commission's rules (Rules),¹ by operating a studio-transmitter link (STL) at a location not authorized by its license. We conclude that Mt. Rushmore is apparently liable for a forfeiture in the amount of eight thousand dollars (\$8,000). In addition, we direct Mount Rushmore to submit, no later than thirty (30) calendar days from the date of this NAL, a statement, signed under penalty of perjury, attesting to its compliance with the Commission's licensing requirements for the STL.²

II. BACKGROUND

2. On Wednesday, August 17, 2011, an agent from the Enforcement Bureau's Denver Office (Denver Office) conducted an inspection of Station KMLD(FM) and its associated STL, Station WLP722. The agent monitored Station WLP722 operation on its authorized frequency 94.6 MHz from the Station KMLD(FM) main studio, located at 218 N. Wolcott Street, Casper, Wyoming. According to the Station WLP722 authorization, the STL is licensed to operate at 150 N. Nichols Street, Casper, Wyoming, approximately 0.3 miles from its current location.

3. On December 23, 2011, the Denver Office issued a Letter of Inquiry (LOI) to Mount Rushmore requesting additional details regarding the license and operation of the Station KMLD(FM) STL.³ After multiple extensions, Mount Rushmore responded on April 11, 2012.⁴ In the *LOI Response*, Mount

¹ 47 C.F.R. § 1.903(a).

² 47 C.F.R. § 1.903(a).

³ See Letter of Inquiry from Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau, to Mt. Rushmore Broadcasting, Inc. (Dec. 23, 2011) (on file in EB-FIELDWR-12-00002388).

⁴ See Letter from Lee J. Peltzman, Esquire, Counsel for Mt. Rushmore Broadcasting, Inc., to Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau (filed Apr. 11, 2012) (on file in EB-FIELDWR-12-00002388) (*LOI Response*).

Rushmore stated that the STL had been in operation as the primary delivery mechanism for Station KMLD(FM) programming since August 31, 2001, and that an application to change the location of Station WLP722 should have been filed when Station KMLD moved its main studio in "late 2001 or early 2002" but could not produce a valid FCC authorization for the STL.⁵ On May 24, 2012, Mount Rushmore filed an application with the Commission to modify the Station WLP722 license to reflect the station's current location.⁶

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁷ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹¹ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹²

A. Operation at an Unauthorized Location

5. The evidence in this case is sufficient to establish that Mount Rushmore violated Section 1.903(a) of the Rules. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service, and with a valid authorization granted by the Commission.¹³ At the time of the August 17, 2011, inspection,

⁵ LOI Response, Jan Gray Declaration at 4.

⁶ See File No. 0005232128, submitted May 24, 2012 (Station WLP722 Modification Application). As of the date of this NAL, the Station WLP722 Modification Application remains pending.

⁷ 47 U.S.C. § 503(b).

⁸ 47 U.S.C. § 312(f)(1).

⁹ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

¹⁰ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹¹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹² Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹³ 47 C.F.R. § 1.903(a).

Mount Rushmore was operating Station WLP722, the Station KMLD(FM) STL at a location approximately 0.3 miles from its authorized location. Mount Rushmore acknowledges the continuous operation of Station WLP722 at this location since August 31, 2001, but is unable to provide any evidence of a Commission authorization for operation at this location. Based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 1.903(a) of the Rules by operating Station WLP722 at allocation not authorized on its license.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation at an unauthorized location is \$4,000.¹⁴ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁵ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we find no downward adjustments are warranted, but conclude that an upward adjustment is warranted because of the long duration of Mount Rushmore's operation of the Station WLP722 at a location not authorized on its license.¹⁶ Accordingly, we propose a forfeiture amount of \$8,000 rather than the base forfeiture amount to Mount Rushmore for its prolonged operation of the Station KMLD(FM) STL at an unauthorized location. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mount Rushmore is apparently liable for a total forfeiture in the amount of eight thousand dollars (\$8,000).

7. We further order Mount Rushmore to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Mount Rushmore, stating that it is operating Station KMLD(FM) and Station WLP722 in compliance with Section 1.903(a) of the Rules,¹⁷ and detailing the specific actions taken by Mount Rushmore to come into compliance. This statement must be provided to the Denver Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Mt. Rushmore Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eight thousand dollars (\$8,000) for violation of Section 1.903(a) of the Rules.¹⁸

¹⁴ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ See 47 C.F.R. § 1.80(b)(5), Note to Paragraph (b)(5): Section II. Adjustment Criteria for Section 503 Forfeitures (establishing "repeated or continuous violation" as an upward adjustment factor). We also note that Mount Rushmore has previously been assessed a forfeiture for violating Section 301 of the Act by operating an unlicensed STL. See *Mount Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 19804 (Enf. Bur. 2003) (forfeiture paid).

¹⁷ 47 C.F.R. § 1.903(a).

¹⁸ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 1.903(a).

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Mt. Rushmore Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Mt. Rushmore Broadcasting, Inc. **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226. Mt. Rushmore shall also e-mail the written statement to WR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Mt. Rushmore Broadcasting, Inc., shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant

¹⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁰ See 47 C.F.R. § 1.1914.

to Sections 1.16 and 1.80(f)(3) of the Rules.²¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226, and include the NAL/Acct. No. referenced in the caption. Mt. Rushmore Broadcasting, Inc., also shall email the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and to its counsel, Lee J. Peltzman, Esq., Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears
District Director
Denver Office
Western Region
Enforcement Bureau

²¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.	)	File No.: EB-FIELDWR-12-00002417
	)	NAL/Acct. No.: 201232800005
Licensee of Station KQLT(FM)	)	FRN: 0008230559
Casper, Wyoming	)	Facility ID No.: 47878
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 25, 2012

Released: July 26, 2012

By the District Director, Denver Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Station KQLT(FM) in Casper, Wyoming, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating a studio-transmitter link (STL) without an authorization. We conclude that Mt. Rushmore is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). In addition, we direct Mount Rushmore to submit, no later than thirty (30) calendar days from the date of this NAL, a statement, signed under penalty of perjury, attesting to its compliance with the Commission's licensing requirements for the STL.²

II. BACKGROUND

2. On Wednesday, August 17, 2011, an agent from the Enforcement Bureau's Denver Office (Denver Office) conducted an inspection of Station KQLT(FM) and its associated STL (Station KQLT(FM) STL). The agent monitored the Station KQLT(FM) STL operation on frequency 951.5 MHz from the station's main studio. An on-scene query of the Commission's databases showed no license issued to Mount Rushmore for an STL on frequency 951.5 MHz in Casper, WY, and Mount Rushmore was unable to produce a Commission authorization for its the operation of the Station KQLT(FM) STL.

3. On December 23, 2011, the Denver Office issued a Letter of Inquiry (LOI) to Mount Rushmore requesting additional details regarding the license and operation of the Station KQLT(FM) STL.³ After multiple extensions, Mount Rushmore responded on April 11, 2012.⁴ In the *LOI Response*, Mount Rushmore stated that the STL had been in operation as the primary delivery mechanism for Station

¹ 47 U.S.C. § 301.

² 47 U.S.C. § 301.

³ See Letter of Inquiry from Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau, to Mt. Rushmore Broadcasting, Inc. (Dec. 23, 2011) (on file in EB-FIELDWR-12-00002417).

⁴ See Letter from Lee J. Peltzman, Esquire, Counsel for Mt. Rushmore Broadcasting, Inc., to Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau (filed Apr. 11, 2012) (on file in EB-FIELDWR-12-00002417) (*LOI Response*).

KQLT(FM) programming since May 10, 1995, and could not produce a valid FCC authorization for the STL.⁵ As of July 2, 2012, a review of Commission records revealed no license or application for Mount Rushmore to operate an STL on frequency 951.5 MHz in Casper, WY.

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁶ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁰ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹¹

A. Operation of an Unlicensed Studio-Transmitter Link

5. The evidence in this case is sufficient to establish that Mount Rushmore violated Section 301 of the Act. Section 301 of the Act requires that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”¹² At the time of the August 17, 2011, inspection, Mount Rushmore was operating an unlicensed STL on the frequency of 951.5 MHz. Mount Rushmore acknowledges the continuous operation of this STL since May 10, 1995, but is unable to provide any evidence of a Commission authorization for this operation. Based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 301

⁵ *LOI Response*, Jan Gray Declaration. Mount Rushmore refers to call sign WHB492 as the license for the STL operating on frequency 951.5 MHz. However, that call sign is issued to another licensee in the Atlanta-Athens, Georgia, area.

⁶ 47 U.S.C. § 503(b).

⁷ 47 U.S.C. § 312(f)(1).

⁸ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁰ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹¹ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹² 47 U.S.C. § 301.

of the Act by operating the Station KQLT(FM) STL without an FCC license for a period exceeding sixteen years.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules,¹³ the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁴ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁵ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we find no downward adjustments are warranted, but conclude that an upward adjustment is warranted because of the long duration of Mount Rushmore's operation of the Station KQLT(FM) STL without an instrument of authorization.¹⁶ Accordingly, we propose a forfeiture amount of \$20,000 rather than the base forfeiture amount to Mount Rushmore for its prolonged unauthorized operation of the Station KQLT(FM) STL. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mount Rushmore is apparently liable for a total forfeiture in the amount of twenty thousand dollars (\$20,000).

7. We further order Mount Rushmore to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Mount Rushmore, stating that it is operating Station KQLT(FM) and its associated STL in compliance with Section 301 of the Act,¹⁷ and detailing the specific actions taken by Mount Rushmore to come into compliance. This statement must be provided to the Denver Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Mt. Rushmore Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A**

¹³ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁴ The Enforcement Bureau has determined that unauthorized operation in any of the licensed services is a serious violation and will merit the base forfeiture of \$10,000 prior to the application of the adjustment criteria listed in Section 503(b)(2)(E) of the Act. See *BASF Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17300, 17302-03, paras. 9-11 (Enf. Bur. 2010) (applying the \$10,000 base forfeiture for unauthorized operation of a station in the Private Land Mobile Radio Service, then upwardly adjusting the total forfeiture to \$25,000 for that violation and for failure to file a timely renewal application for the station).

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ See 47 C.F.R. § 1.80(b)(5), Note to Paragraph (b)(5): Section II. Adjustment Criteria for Section 503 Forfeitures (establishing "repeated or continuous violation" as an upward adjustment factor). We also note that Mount Rushmore has previously been assessed a forfeiture for violating Section 301 of the Act by operating an unlicensed STL. See *Mount Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 19804 (Enf. Bur. 2003) (forfeiture paid).

¹⁷ 47 U.S.C. § 301.

FORFEITURE in the amount of twenty thousand dollars (\$20,000) for violation of Section 301 of the Act.¹⁸

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Mt. Rushmore Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Mt. Rushmore Broadcasting, Inc., **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226. Mt. Rushmore shall also e-mail the written statement to WR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Mt. Rushmore Broadcasting, Inc., shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

¹⁸ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

¹⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁰ See 47 C.F.R. § 1.1914.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226, and include the NAL/Acct. No. referenced in the caption. Mt. Rushmore Broadcasting, Inc., also shall email the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and to its counsel, Lee J. Peltzman, Esq., Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears
District Director
Denver Office
Western Region
Enforcement Bureau

²¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.	)	File No.: EB-FIELDWR-12-00002409
	)	NAL/Acct. No.: 201232800006
Licensee of Station KHOC(FM)	)	FRN: 0008230559
Casper, Wyoming	)	Facility ID No.: 15925
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 25, 2012**Released: July 26, 2012**

By the District Director, Denver Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Station KHOC(FM) in Casper, Wyoming, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating a studio-transmitter link (STL) without an authorization. We conclude that Mt. Rushmore is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). In addition, we direct Mount Rushmore to submit, no later than thirty (30) calendar days from the date of this NAL, a statement, signed under penalty of perjury, attesting to its compliance with the Commission's licensing requirements for the STL.²

II. BACKGROUND

2. On Wednesday, August 17, 2011, an agent from the Enforcement Bureau's Denver Office (Denver Office) conducted an inspection of Station KHOC(FM) and its associated STL (Station KHOC(FM) STL). The agent monitored the Station KHOC(FM) STL operation on frequency 944.5 MHz from the station's main studio. An on-scene query of the Commission's databases showed no license issued to Mount Rushmore for an STL on frequency 944.5 MHz in Casper, WY, and Mount Rushmore was unable to produce a Commission authorization for its the operation of the Station KHOC(FM) STL.

3. On December 23, 2011, the Denver Office issued a Letter of Inquiry (LOI) to Mount Rushmore requesting additional details regarding the license and operation of the Station KHOC(FM) STL.³ After multiple extensions, Mount Rushmore responded on April 11, 2012.⁴ In the *LOI Response*, Mount Rushmore stated that the STL had been in operation as the primary delivery mechanism for Station

¹ 47 U.S.C. § 301.

² 47 U.S.C. § 301.

³ See Letter of Inquiry from Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau, to Mt. Rushmore Broadcasting, Inc. (Dec. 23, 2011) (on file in EB-FIELDWR-12-00002409).

⁴ See Letter from Lee J. Peltzman, Esquire, Counsel for Mt. Rushmore Broadcasting, Inc., to Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau (filed Apr. 11, 2012) (on file in EB-FIELDWR-12-00002409) (*LOI Response*).

KHOC(FM) programming since April 7, 2000, and could not produce a valid FCC authorization for the STL.⁵ On May 24, 2012, Mount Rushmore submitted an application to the Commission requesting authority to operate an STL on frequency 944.5 MHz for Station KHOC(FM) in Casper, WY.⁶

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁷ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹¹ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹²

A. Operation of an Unlicensed Studio-Transmitter Link

5. The evidence in this case is sufficient to establish that Mount Rushmore violated Section 301 of the Act. Section 301 of the Act requires that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”¹³ At the time of the August 17, 2011, inspection, Mount Rushmore was operating an unlicensed STL on the frequency of 944.5 MHz. Mount Rushmore acknowledges the continuous operation of this STL since April 7, 2000, but is unable to provide any evidence of a Commission authorization for this operation. Based on the

⁵ *LOI Response*, Jan Gray Declaration.

⁶ See File No. 0005232119, submitted May 24, 2012 (Station KHOC(FM) STL Application). As of the date of this NAL, the Station KHOC(FM) STL Application remains pending.

⁷ 47 U.S.C. § 503(b).

⁸ 47 U.S.C. § 312(f)(1).

⁹ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

¹⁰ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹¹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹² Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹³ 47 U.S.C. § 301.

evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 301 of the Act by operating the Station KHOC(FM) STL without an FCC license for a period exceeding eleven years.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules,¹⁴ the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁵ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we find no downward adjustments are warranted, but conclude that an upward adjustment is warranted because of the long duration of Mount Rushmore's operation of the Station KHOC(FM) STL without an instrument of authorization.¹⁷ Accordingly, we propose a forfeiture amount of \$20,000 rather than the base forfeiture amount to Mount Rushmore for its prolonged unauthorized operation of the Station KHOC(FM) STL. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mount Rushmore is apparently liable for a total forfeiture in the amount of twenty thousand dollars (\$20,000).

7. We further order Mount Rushmore to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Mount Rushmore, stating that it is operating Station KHOC(FM) and its associated STL in compliance with Section 301 of the Act,¹⁸ and detailing the specific actions taken by Mount Rushmore to come into compliance. This statement must be provided to the Denver Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Mt. Rushmore Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A**

¹⁴ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁵ The Enforcement Bureau has determined that unauthorized operation in any of the licensed services is a serious violation and will merit the base forfeiture of \$10,000 prior to the application of the adjustment criteria listed in Section 503(b)(2)(E) of the Act. See *BASF Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17300, 17302-03, paras. 9-11 (Enf. Bur. 2010) (applying the \$10,000 base forfeiture for unauthorized operation of a station in the Private Land Mobile Radio Service, then upwardly adjusting the total forfeiture to \$25,000 for that violation and for failure to file a timely renewal application for the station).

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ See 47 C.F.R. § 1.80(b)(5), Note to Paragraph (b)(5): Section II. Adjustment Criteria for Section 503 Forfeitures (establishing "repeated or continuous violation" as an upward adjustment factor). We also note that Mount Rushmore has previously been assessed a forfeiture for violating Section 301 of the Act by operating an unlicensed STL. See *Mount Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 19804 (Enf. Bur. 2003) (forfeiture paid).

¹⁸ 47 U.S.C. § 301.

FORFEITURE in the amount of twenty thousand dollars (\$20,000) for violation of Section 301 of the Act.¹⁹

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Mt. Rushmore Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Mt. Rushmore Broadcasting, Inc., **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226. Mt. Rushmore shall also e-mail the written statement to WR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Mt. Rushmore Broadcasting, Inc., shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

¹⁹ 47 U.S.C. §§ 301 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²¹ See 47 C.F.R. § 1.1914.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226, and include the NAL/Acct. No. referenced in the caption. Mt. Rushmore Broadcasting, Inc., also shall email the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and to its counsel, Lee J. Peltzman, Esq., Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears
District Director
Denver Office
Western Region
Enforcement Bureau

²² 47 C.F.R. §§ 1.16, 1.80(f)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.	)	File No.: EB-FIELDWR-12-00002419
	)	NAL/Acct. No.: 201232800007
Licensee of Station KASS(FM)	)	FRN: 0008230559
Casper, Wyoming	)	Facility ID No.: 43477
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 25, 2012

Released: July 26, 2012

By the District Director, Denver Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Station KASS(FM) in Casper, Wyoming, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating a studio-transmitter link (STL) without an authorization. We conclude that Mt. Rushmore is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). In addition, we direct Mount Rushmore to submit, no later than thirty (30) calendar days from the date of this NAL, a statement, signed under penalty of perjury, attesting to its compliance with the Commission's licensing requirements for the STL.²

II. BACKGROUND

2. On Wednesday, August 17, 2011, an agent from the Enforcement Bureau's Denver Office (Denver Office) conducted an inspection of Station KASS(FM) and its associated STL (Station KASS(FM) STL). The agent monitored the Station KASS(FM) STL operation on frequency 950.5 MHz from the station's main studio. An on-scene query of the Commission's databases showed no license issued to Mount Rushmore for an STL on frequency 950.5 MHz in Casper, WY, and Mount Rushmore was unable to produce a Commission authorization for its operation of the Station KASS(FM) STL.

3. On December 23, 2011, the Denver Office issued a Letter of Inquiry (LOI) to Mount Rushmore requesting additional details regarding the license and operation of the Station KASS(FM) STL.³ After multiple extensions, Mount Rushmore responded on April 11, 2012.⁴ In the *LOI Response*, Mount Rushmore stated that the STL had been in operation as the primary delivery mechanism for Station

¹ 47 U.S.C. § 301.

² 47 U.S.C. § 301.

³ See Letter of Inquiry from Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau, to Mt. Rushmore Broadcasting, Inc. (Dec. 23, 2011) (on file in EB-FIELDWR-12-00002419).

⁴ See Letter from Lee J. Peltzman, Esquire, Counsel for Mt. Rushmore Broadcasting, Inc., to Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau (filed Apr. 11, 2012) (on file in EB-FIELDWR-12-00002419) (*LOI Response*).

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KASS(FM) programming since June 20, 1995, and could not produce a valid FCC authorization for the STL.⁵ On May 24, 2012, Mount Rushmore submitted an application to the Commission requesting authority to operate an STL on frequency 950.5 MHz for Station KASS(FM) in Casper, WY.⁶

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁷ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹¹ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹²

A. Operation of an Unlicensed Studio-Transmitter Link

5. The evidence in this case is sufficient to establish that Mount Rushmore violated Section 301 of the Act. Section 301 of the Act requires that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”¹³ At the time of the August 17, 2011, inspection, Mount Rushmore was operating an unlicensed STL on frequency 950.5 MHz. Mount Rushmore acknowledges the continuous operation of this STL since June 20, 1995, but is unable to provide any evidence of a Commission authorization for this operation. Based on the evidence

⁵ *LOI Response, Jan Gray Declaration.*

⁶ See File No. 0005232113, submitted May 24, 2012 (Station KASS(FM) STL Application). As of the date of this NAL, the Station KASS(FM) STL Application remains pending.

⁷ 47 U.S.C. § 503(b).

⁸ 47 U.S.C. § 312(f)(1).

⁹ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

¹⁰ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹¹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹² Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹³ 47 U.S.C. § 301.

before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 301 of the Act by operating the Station KASS(FM) STL without an FCC license for a period exceeding sixteen years.

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules,¹⁴ the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁵ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we find no downward adjustments are warranted, but conclude that an upward adjustment is warranted because of the long duration of Mount Rushmore's operation of the Station KASS(FM) STL without an instrument of authorization.¹⁷ Accordingly, we propose a forfeiture amount of \$20,000 rather than the base forfeiture amount to Mount Rushmore for its prolonged unauthorized operation of the Station KASS(FM) STL. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mount Rushmore is apparently liable for a total forfeiture in the amount of twenty thousand dollars (\$20,000).

7. We further order Mount Rushmore to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Mount Rushmore, stating that it is operating Station KASS(FM) and its associated STL in compliance with Section 301 of the Act,¹⁸ and detailing the specific actions taken by Mount Rushmore to come into compliance. This statement must be provided to the Denver Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Mt. Rushmore Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A**

¹⁴ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁵ The Enforcement Bureau has determined that unauthorized operation in any of the licensed services is a serious violation and will merit the base forfeiture of \$10,000 prior to the application of the adjustment criteria listed in Section 503(b)(2)(E) of the Act. See *BASF Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17300, 17302-03, paras. 9-11 (Enf. Bur. 2010) (applying the \$10,000 base forfeiture for unauthorized operation of a station in the Private Land Mobile Radio Service, then upwardly adjusting the total forfeiture to \$25,000 for that violation and for failure to file a timely renewal application for the station).

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ See 47 C.F.R. § 1.80(b)(5), Note to Paragraph (b)(5): Section II. Adjustment Criteria for Section 503 Forfeitures (establishing "repeated or continuous violation" as an upward adjustment factor). We also note that Mount Rushmore has previously been assessed a forfeiture for violating Section 301 of the Act by operating an unlicensed STL. See *Mount Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 19804 (Enf. Bur. 2003) (forfeiture paid).

¹⁸ 47 U.S.C. § 301.

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FORFEITURE in the amount of twenty thousand dollars (\$20,000) for violation of Section 301 of the Act.¹⁹

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Mt. Rushmore Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Mt. Rushmore Broadcasting, Inc., **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226. Mt. Rushmore shall also e-mail the written statement to WR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Mt. Rushmore Broadcasting, Inc., shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

¹⁹ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²¹ See 47 C.F.R. § 1.1914.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226, and include the NAL/Acct. No. referenced in the caption. Mt. Rushmore Broadcasting, Inc., also shall email the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and to its counsel, Lee J. Peltzman, Esq., Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, D.C. 20036.

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Nikki P. Shears
District Director
Denver Office
Western Region
Enforcement Bureau

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²² 47 C.F.R. §§ 1.16, 1.80(f)(3).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Alaska Integrated Media, Inc.	)	File No.: EB-FIELDWR-12-00001355
	)	NAL/Acct. No.: 201232780002
Licensee of Station KOAN	)	FRN: 0020201240
Anchorage, Alaska	)	Facility ID No.: 53491
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 26, 2012**Released: July 27, 2012**

By the Resident Agent, Anchorage Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Alaska Integrated Media, Inc. (Alaska Integrated), licensee of AM Station KOAN (Station), in Anchorage, Alaska, apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules),¹ by failing to enclose the Station KOAN antenna tower (the Antenna Structure) within an effective locked fence or other enclosure. We conclude that Alaska Integrated is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000). In addition, we direct Alaska Integrated to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury stating that its Antenna Structure complies with the Commission's fencing requirements.

II. BACKGROUND

2. On March 8, 2012, and again on March 15, 2012, agents from the Enforcement Bureau's Anchorage Office (Anchorage Office) inspected Station KOAN's AM antenna tower site located in Knik, Alaska. The agents observed a wooden plank fence enclosing the base of the Antenna Structure. However, the agents also observed that several of the wood planks were missing, lying on the snow next to the bottom of the fence, and the missing planks allowed ready access to the base of the Antenna Structure. The agents further observed a residence within 500 feet and a public road within 300 feet of the Antenna Structure. In addition, no perimeter fence impeded access to the Antenna Structure site.

3. On March 22, 2012, the Anchorage agents visited the Station's main studio² and notified the Station's operations manager about the deficiencies in the fence. The operations manager told the agents that he was unaware that planks were missing from the fence but stated that he would have someone go out and assess the situation.

¹ 47 C.F.R. § 73.49.

² The main studio is located approximately 21.5 miles from the Station KOAN AM tower structure.

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.³ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁴ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁵ and the Commission has so interpreted the term in the Section 503(b) context.⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁷ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁸

A. Failure to Enclose the Antenna Structure Within an Effective Locked Fence

5. Section 73.49 of the Rules states that “[a]ntenna towers having radio frequency at the base . . . must be enclosed within effective locked fences or other enclosures.”⁹ Individual tower fences need not be installed if the towers are contained within a protective property fence.¹⁰ In adopting the *Report and Order* promulgating the most recent amendment of Section 73.49, the Commission stated that “a fencing requirement is necessary to protect the general public.”¹¹ On March 8, 2012, and again on March 15, 2012, Anchorage agents observed that wood planks were missing from the fence enclosing the base of the Station’s Antenna Structure, thereby allowing access to its base. In addition, the agents did not observe a perimeter fence surrounding the property. Based on the evidence before us, we find that Alaska Integrated apparently willfully and repeatedly violated section 73.49 of the Rules by failing to enclose the Station’s Antenna Structure within an effective locked fence or other enclosure.

³ 47 U.S.C. § 503(b).

⁴ 47 U.S.C. § 312(f)(1).

⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[.] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

⁶ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁷ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

⁹ 47 C.F.R. § 73.49.

¹⁰ *Id.*

¹¹ *Review of the Technical and Operational Regulations of Part 73, Subpart A, AM Broadcast Stations*, Report and Order, 59 Rad. Reg. 2d (Pike & Fischer) 927, para. 6 (1986) (*Report and Order*).

B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to maintain effective AM tower fencing is \$7,000.¹² In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹³ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Alaska Integrated is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

7. We further order Alaska Integrated to submit a written statement, pursuant to Section 1.16 of the Rules,¹⁴ signed under penalty of perjury by an officer or director of Alaska Integrated, stating that the Station complies with the Commission's fencing rules and that its antenna structure is enclosed within an effective locked fence or other enclosure. This statement must be provided to the Anchorage Resident Agent Office at the address listed in paragraph 10 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Alaska Integrated Media, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seven thousand dollars (\$7,000) for violation of Section 73.49 of the Rules.¹⁵

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Alaska Integrated Media, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Alaska Integrated Media, Inc. **SHALL SUBMIT** a written statement, as described in paragraph 7, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Anchorage Resident Agent Office, P.O. Box 231949, Anchorage, Alaska, 99523-1949. Alaska Integrated Media, Inc. shall also e-mail the written statement to WR-Response@fcc.gov.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Alaska Integrated Media, Inc. will also send electronic notification on the date said payment is made to WR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁶ When completing the FCC Form 159, enter the Account Number in block

¹² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹³ 47 U.S.C. § 503(b)(2)(E).

¹⁴ 47 C.F.R. § 1.16.

¹⁵ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.49.

¹⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁷ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.¹⁸ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Anchorage Resident Agent Office, P.O. Box 231949, Anchorage, Alaska, 99523-1949 and include the NAL/Acct. No. referenced in the caption. Alaska Integrated Media, Inc. also shall email the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹⁷ See 47 C.F.R. § 1.1914.

¹⁸ 47 C.F.R. §§ 1.16, 1.80(f)(3).

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Alaska Integrated Media, Inc. at 4700 Business Park Boulevard, Suite 44-A, Anchorage, Alaska 99503.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Windel
Resident Agent
Anchorage Resident Agent Office
Western Region
Enforcement Bureau



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DA 12-1187
July 25, 2012

CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU REMINDS STATE TELECOMMUNICATIONS RELAY SERVICE PROGRAMS TO SEEK RECERTIFICATION

CG Docket No. 03-123

This Public Notice alerts states and territories that the certifications that they now hold for the provision of telecommunications relay services (TRS) will expire on July 26, 2013.¹ Under the Federal Communications Commission's (Commission's) TRS regulations, each state or territory may file an application for "renewal" of its certification one year prior to expiration, *i.e.*, beginning on July 26, 2012.² Although there is no prescribed deadline for filing, we request that renewal applications be filed no later than October 1, 2012, to give the Commission sufficient time to review and rule on the applications prior to the expiration of the existing certifications.

Congress created the TRS program in Title IV of the Americans with Disabilities Act of 1990 (ADA),³ codified at Section 225 of the Communications Act of 1934, as amended (Act).⁴ TRS enables persons with hearing and speech disabilities to access the telephone system to communicate with other individuals.⁵ Under the Act, the Commission must ensure the provision of TRS that is functionally equivalent to voice telephone service.⁶ The Commission's TRS regulations set forth mandatory minimum standards that TRS providers must follow to meet this functional equivalency mandate.⁷

¹ As amended by Section 103(a) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), TRS is defined as "telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio." Pub. L. No. 111-260, 124 Stat. 2751, *technical amendments*, Pub. L. No. 111-265, 124 Stat. 2795 (Oct. 8, 2010) § 103(a), codified at 47 U.S.C. § 225(a)(3). See also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Red 12475, 12479, ¶ 3 n.18 (2004) (describing how a traditional TRS call works).

² 47 C.F.R. § 64.606(c)(1). Since 1993, the Commission has granted states certification to operate their own TRS programs in five year increments. The Consumer and Governmental Affairs Bureau, under delegated authority, issued its last round of certification grants in July 2008.

³ Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990).

⁴ 47 U.S.C. § 225.

⁵ 47 U.S.C. § 225(a)(3).

⁶ 47 U.S.C. § 225(a)(3).

⁷ See 47 C.F.R. § 64.604.

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Under Section 225, states wishing to establish their own TRS programs for the provision of intrastate and interstate TRS over the public switched telephone network may receive Commission certification to do so.⁸ All certified state TRS programs are required to provide traditional (TTY-based) TRS, interstate Spanish language traditional TRS, and Speech-to-Speech relay (STS) service.⁹ States may also offer captioned telephone relay service (CTS). States seeking renewal of their certification must include information about each of these services in their applications so that the Commission can ensure that the provision of these services is consistent with its rules and that the state is exercising responsibility for oversight of these services.¹⁰

Specifically, in order to obtain certification, a state must submit documentation to the Commission that describes its relay program and include its procedures and remedies for enforcing any requirements that the program may impose.¹¹ In addition, a state must establish that its program makes available to TRS users informational materials on state and Commission complaint procedures sufficient for users to know the proper procedures for filing complaints.¹² The Commission's TRS regulations explain that documentation should be submitted in narrative form, and that the Commission shall give the public notice of such applications.¹³

The state certification process is intended to ensure that TRS is provided in a uniform manner throughout the United States and territories. Applications for certification will be reviewed to determine whether each state TRS program has sufficiently documented that it meets or exceeds all of the applicable operational, technical and functional mandatory minimum standards set forth in section 64.604 of the Commission's rules.¹⁴ If the program exceeds the mandatory minimum standards, the state must establish that the program does not conflict with federal law.¹⁵ In addition, applications will be reviewed to ensure that each state TRS program makes available adequate procedures and remedies for enforcing the requirements of each state's program.¹⁶

⁸ Although state TRS programs may offer interstate as well as intrastate TRS, only the costs associated with the provision of intrastate TRS are recovered from the state. See 47 U.S.C. § 225(d)(3). States with certified TRS programs may allow TRS providers operating under their programs to recover such costs by a method consistent with the jurisdictional separation of costs requirements of Section 225. See *id.* Costs associated with the provision of interstate TRS are recovered from subscribers of interstate and Voice over Internet Protocol (VoIP) service, and such providers are reimbursed through the TRS Interstate Fund. *Id.* In October 2011, the Commission adopted rules to implement Section 103(b) of the CVAA, requiring interconnected and non-interconnected VoIP service providers to participate in and contribute to the TRS Fund. See CVAA § 715; 47 U.S.C. § 616; *Contributions to the Telecommunications Relay Service Fund*, CG Docket No. 11-47, Report and Order, 26 FCC Rcd 14532 (2011).

⁹ See 47 C.F.R. § 64.603.

¹⁰ Since 2003, CTS has been a non-mandatory type of TRS that is eligible for compensation from the states for intrastate calls and from the Interstate TRS Fund for interstate or IP-based CTS calls. *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling, 18 FCC Rcd 16121 (2003). If a state does not offer CTS, it need not submit documentation in its certification application pertaining to this service.

¹¹ 47 U.S.C. § 225(f); 47 C.F.R. § 64.606(a).

¹² 47 C.F.R. § 64.606(b)(1)(ii).

¹³ 47 C.F.R. § 64.606(a).

¹⁴ 47 U.S.C. § 225(f)(2)(A). See 47 C.F.R. § 64.604.

¹⁵ See 47 C.F.R. § 64.606(b)(1)(iii).

¹⁶ 47 U.S.C. § 225(f)(2)(B).

PROCEDURES FOR FILING: All filings must reference CG Docket No. 03-123 and be captioned "TRS State Certification Application."

Electronic Filers: Filings may be filed electronically using the Internet by accessing the Commission's electronic comment filing system (ECFS): <http://apps.fcc.gov/ecfs/>. Follow the instructions provided on the website for submitting electronic filings. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal service mailing address, and **CG Docket No. 03-123**.

Paper Filers: Parties who choose to submit by paper must submit an original and one copy of each filing. To expedite the processing of the applications, parties submitting by paper are encouraged to submit an additional copy to Attn: Dana Wilson, Federal Communications Commission, Consumer and Governmental Affairs Bureau, 445 12th Street, SW, Room 3-C418, Washington, DC 20554 or by email at Dana.Wilson@fcc.gov. Parties should also submit electronic disk copies of their certification filing. The electronic media should be submitted in "read-only" mode and must be clearly labeled with the state's name, the filing date and captioned "TRS Certification Application."

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filing for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filings hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

SUMMARY OF STATE TRS PROGRAM CERTIFICATION TIMELINE

DATE	ITEM	FCC ACTION
Beginning July 2012	Commission issues Public Notices seeking comment on state TRS applications that have been filed.	Comments are due within 30 days of release of the Public Notices; reply comments are due within 15 days thereafter.
July 2012 – May 2013	Commission reviews applications for TRS recertification for compliance with 47 C.F.R. §§ 64.604 and 64.606.	If necessary, Commission sends deficiency letters requesting additional information from states to confirm compliance with the TRS mandatory minimum standards and other certification requirements.
May – July 2013		Commission issues Public Notices and Letter Orders of certification renewals.

ADDITIONAL INFORMATION

A copy of this *Public Notice* and related documents are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, DC 20554. These documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554. Customers may contact BCPI at their web site: www.bcpinc.com or by calling (202) 488-5300. Filings also may be found by searching on the Commission's Electronic Comment Filing System (ECFS) at <http://apps.fcc.gov/ecfs/> (insert CG Docket No. 03-123 into the Proceeding block).

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This *Public Notice* also can be downloaded in Word or Portable Document Format (PDF) at: <http://transition.fcc.gov/egb/dro/trs.html>.

For further information regarding this *Public Notice*, please contact Dana Wilson, Consumer and Governmental Affairs Bureau, Disability Rights Office, at (202) 418-2247 (voice), (202) 418-2297 (TTY), or e-mail at Dana.Wilson@fcc.gov.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the Acting Chief, Wireline Competition Bureau:

1. On July 11, 2012, the National Association of State Utility Consumer Advocates ("NASUCA") filed a motion for extension of time¹ requesting an additional thirty days for parties to file reply comments in the *Contribution Methodology Reform and Modernization Further Notice* proceeding.² NASUCA seeks an extension of time "to review and study initial comments and potentially to formulate thoughtful reply comments" and to coordinate proposed comments among its membership.³

2. As provided in section 1.46(a) of the Commission's rules, it is the policy of the Commission that extensions of time shall not be routinely granted.⁴ In reviewing the instant request, we consider the Commission's general policy as reflected in section 1.46(a) and the time period provided for parties to review and respond to comments filed in the *Contribution Methodology Reform and Modernization Further Notice* proceeding.

3. We find that the circumstances presented here do not warrant granting an extension of time to file reply comments. We therefore deny NASUCA's motion for extension of time to file reply comments in the *Contribution Methodology Reform and Modernization Further Notice* proceeding.⁵

4. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c), section 1.46 of the

¹ Motion for Extension of Time to File Reply Comments by National Association of State Utility Consumer Advocates, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 11, 2012) (NASUCA Motion).

² *Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012) (*Contribution Methodology Reform and Modernization Further Notice*). The Wireline Competition Bureau issued a Public Notice announcing deadlines for filing comments in the *Contribution Methodology Reform and Modernization Further Notice* proceeding. See *Wireline Competition Bureau Announces Deadlines for Comments on Universal Service Contribution Methodology Further Notice of Proposed Rulemaking*, WC Docket No. 06-122, GN Docket No. 09-51, Public Notice, DA 12-905 (Wireline Comp. Bur., rel. Jun. 7, 2012).

³ See NASUCA Motion at 2-3.

⁴ 47 C.F.R. § 1.46(a).

⁵ We remind parties that they may continue to file ex parte presentations for this proceeding. 47 C.F.R. §§ 1.1200 *et seq.*

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Commission's rules, 47 C.F.R. § 1.46, and pursuant to the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the motion for extension of time filed by the National Association of State Utility Consumer Advocates IS DENIED as discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Waiver and Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Akisha Networks, Inc.	)	SLD File Nos. 599288, 631306
Houston, TX)	
)	
Central Montcalm Public School District	)	SLD File Nos. 449655, 495449,
Stanton, MI	)	572376, 597140
)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we deny three appeals² seeking review of decisions of the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as

¹ See *Request for Review by Approach Learning and Assessment Center, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 22 FCC Rcd 5296, para. 19 (2007) (finding that when an applicant gives an entity the ability to control the dissemination of information regarding the service requests and that entity also participates in the competitive bidding process as a prospective service provider, the applicant impairs its ability to hold fair and open competitive bidding process); *Request for Review of the Decision of the Universal Service Administrator by Send Technologies, L.L.C.*, CC Docket No. 02-6, 22 FCC Rcd 4920, 4952, para. 6 (2007) (finding a conflict of interest existed between the applicant and its selected service provider where an employee named as the contact person on the FCC Form 470 also owned a 15 percent interest in the service provider and participated in the request and preparation for bids); see also *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26434, para. 60 (2003) (stating “[w]e stress that direct involvement in an application process by a service provider would thwart the competitive bidding process”).

² See Letter from Jake Helms, Central Montcalm Public School District, to Federal Communications Commission, CC Docket No. 02-6 (filed Oct. 3, 2011) (Central Montcalm Request for Review); Letter from Ronald T. Smith, Akisha Networks, Inc., to Federal Communications Commission, CC Docket No. 02-6 (dated Mar. 11, 2011) (requesting an opportunity to respond to USAC’s decision because it had not received notice of USAC’s decision relating to Houston Heights Learning Academy (Houston Heights)) (Akisha Houston Heights Request for Review); Letter from Ronald T. Smith, Akisha Networks, Inc., to Federal Communications Commission, CC Docket No. 02-6 (dated Mar. 26, 2012) (Akisha Houston Heights Supplement); Letter from Ronald T. Smith, Akisha Networks, Inc., to Federal Communications Commission, CC Docket No. 02-6 (dated Mar. 11, 2011) (relating to La Amistad Love and Learning Academy (La Amistad)) (Akisha La Amistad Request for Review). The three appeals are also identified in the Appendix.

the schools and libraries universal service support program).³ In each of the decisions, USAC found that there was improper vendor involvement in the competitive bidding process in violation of the Commission's requirements.⁴ Based on the record before us, we affirm USAC's decisions and find improper vendor involvement in the competitive bidding process in each case.⁵

2. In each instance, we find that the financial relationship between the E-rate consultant and the selected service provider constitutes a prohibited conflict of interest under E-rate program rules.⁶ We deny the appeal filed by the Central Montcalm Public School District because we find that Elite Fund, Inc. (Elite), owned by Steve Meinhardt, assisted Central Montcalm in the preparation of its FCC Form 470, and Central Montcalm subsequently entered into a multi-year service agreement with another company owned by Mr. Meinhardt, CASAIR, Inc.⁷ We also deny two appeals filed by the service provider, Akisha Networks, because Akisha Networks paid a sales commission to a consultant that was used by both La Amistad Love and Learning Academy and Houston Heights Learning Academy to assist

³ Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

⁴ See Letter from USAC, Schools and Libraries Division, to Michele Videtich, Central Montcalm Public School District (dated Aug. 16, 2011) ("Elite was considered a service provider and therefore could not act as an independent consultant on behalf of the applicant or assist the applicant with tasks that service providers are prohibited from undertaking."); Letter from USAC, Schools and Libraries Division, to Ronald T. Smith, Akisha Networks, Inc. (dated Dec. 21, 2010) (stating that the applicant's consultant was being paid a sales commission by Akisha in violation of program policies) (Akisha Houston Heights Commitment Adjustment (COMAD)); Letter from USAC, Schools and Libraries Division, to Ronald Smith, Akisha Networks, Inc. (dated Sept. 27, 2010) (Akisha La Amistad COMAD).

⁵ Because we find that there was improper vendor involvement in the competitive bidding process, we dismiss as moot Akisha Networks, Inc.'s (Akisha Networks) arguments concerning the cost-effectiveness of its selected services. See Akisha Houston Heights Supplement at 5. We grant Akisha Networks's request for waiver of the appeal filing deadline for application number 599288 because we find that Akisha Networks submitted its appeal to USAC within a reasonable period of time after receiving actual notice of USAC's adverse decision. 47 C.F.R. § 54.720. Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. See, e.g., *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Albuquerque School District, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-548427, et al., CC Docket No. 02-6, Order, 26 FCC Rcd 5878 (Wireline Comp. Bur. 2011) (waiving the Commission's filing deadline for six applicants because the Bureau found that these applicants could not submit their appeals to the Commission in a timely manner due to circumstances beyond their control or because the petitioner submitted its appeal to USAC within a reasonable period of time after receiving actual notice of USAC's adverse decision).

⁶ See *supra* n.1.

⁷ See Central Montcalm Request for Review at 2 (stating that although Steve Meinhardt owned both companies, they "were run completely separate"). Central Montcalm's funding year 2006 through 2008 FCC Form 471 applications each referenced the underlying FCC Form 470. See e.g. Central Montcalm Public School District, FCC Form 471 (filed on Feb. 2, 2006) (citing Central Montcalm Public School District, FCC Form 470 (posted Nov. 28, 2005) (FCC Form 470 No. 84425000548560)).

them with their E-rate selection processes.⁸ A consultant, acting on behalf of the applicant, exerts great influence on an applicant's bidding process and thus, should not have a financial relationship with a service provider which it selects (or recommends) on behalf of the applicant.⁹ Here, the consultant participated in the bidding process and ultimately selected a service provider with which it had business relationships. We therefore find that these relationships impaired the applicants' ability to hold fair and open competitive bidding processes.¹⁰ Akisha Networks appealed two commitment adjustment (COMAD) decisions made by USAC, we thus direct USAC, as it relates to the Akisha Networks appeals, to continue recovery actions against the party or parties responsible for the rule violations.¹¹

3. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that the appeals filed by Akisha Networks, Inc. and Central Montcalm Public School District, as listed in the Appendix, ARE DENIED.

4. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that section 54.720 of the Commission's rules, IS WAIVED to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

⁸ See generally Akisha Houston Heights COMAD and Akisha La Amistad COMAD.

⁹ See generally n.1.

¹⁰ *Id.*

¹¹ In the *Commitment Adjustment Implementation Order*, the Commission established procedures to recover funds disbursed to parties that obtained the funds in violation of the Commission's E-rate program. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 97-21, 96-45, Order, 15 FCC Rcd 22975 (2001) (*Commitment Adjustment Implementation Order*). Subsequently, in the *Schools and Libraries Fourth Report and Order*, the Commission modified the rules governing COMAD recovery actions to allow USAC to pursue recovery actions against the party responsible for the violation such as the school, library, or service provider. See *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255-15257, paras. 10-15 (2004) (*Schools and Libraries Fourth Report and Order*).

APPENDIX

Petitioners	Application Number(s)	Funding Year	Date Appeal Filed
Akisha Networks, Inc. (Houston Heights Learning Academy) Houston, TX	599288	2008	Mar. 11, 2011
Akisha Networks, Inc. (L.A. Amistad Love and Learning Academy) Houston, TX	631306	2008	Aug. 22, 2011
Central Montclair Public School District Stanton, MI	449655	2006	Oct. 3, 2011
	495449	2006	
	572376	2007	
	597140	2008	

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Review of the Decision of the)	
Universal Service Administrator by)	
)	
South Country Central School District	)	File No. SLD-139055
East Patchogue, New York)	
)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: July 25, 2012**Released: July 25, 2012**

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. In this order we dismiss an appeal filed by South Country Central School District (South Country) seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program) to deny South Country E-rate funds for wide area network (WAN) services that USAC found to be ineligible for funding.¹ We dismiss as moot the appeal based on our finding that South Country submitted a different application the same funding year using the same contract for services and received E-rate funding for those services.

2. South Country requested E-rate funding in funding year 1999 for leased wide area network services from Cablevision Lightpath.² South Country indicated that it was seeking E-rate discounts for "WAN Telecom Services" and Internet access but requested funding for these recurring and non-recurring services as internal connections on its FCC Form 471.³ USAC denied the request finding that South Country sought E-rate support for ineligible WAN construction costs.⁴ USAC also denied South

¹ Letter from Mark Schissler, South Country Central School District, to Office of the Secretary, Federal Communications Commission (dated May 10, 2000) (Request for Review). Section 54.719(c) of our rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

² The funding request included a non-recurring installation fee of \$514,730.00 and recurring monthly service charges of \$6768.40 for OC-3 WAN service (\$5782.50 per month), Internet local loop service (\$460.90 per month), and Internet access service (\$525.00 per month). FCC Form 471, South Country Central School District, filed April 2, 1999, Attachment - Cablevision Lightpath Contract, signed March 31, 1999 (Cablevision Lightpath Contract).

³ FCC Form 471, File No. SLD-139055, South Country Central School District, Block 5-Services Ordered, filed April 2, 1999.

⁴ Letter from USAC, Schools and Libraries Division, to Sally Neumann, South Country Central School District dated Nov. 2, 1999 (Funding Commitment Decision Letter) (finding that 30% or more of the funding request included a request for WAN construction which is an ineligible product or service).

Country's appeal of that funding decision. During the pendency of its appeal with USAC, South Country resubmitted its request for these same services under a new application number seeking the same services, for the same funding year, under the telecommunications services category.⁵ That funding request was approved.⁶

3. In light of the fact that South County received E-rate support for the requested services for the funding year at issue in South County's appeal, albeit under a different funding request, we dismiss South County's appeal as moot.

4. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that the request for review filed by South Country Central School District, East Patchogue, New York, on May 10, 2000 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

⁵ FCC Form 471, File No. SLD-209311, South Country Central School District, Block 5-Services Ordered, filed March 31, 2000 (requesting WAN telecommunications contract under the same Cablevision Lightpath Contract that was attached to South Country's application for File No. SLD-139055). In fact, the contract with Cablevision Lightpath for the WAN services that was part of South Country's first funding request is identical to the contract South Country used in its second request that USAC approved and funded. See Cablevision Lightpath Contract.

⁶ See USAC website, Funding Request Data Retrieval Tool, <http://www.slforms.universalservice.org/DRF/Default.aspx#0>, last visited July 25, 2012.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
BOROUGH OF ROSELLE PARK, NEW) File No. 0002932068
JERSEY)
)
Request for Waiver of Sections 90.305(a),)
90.307(d), and 90.309 of the Commission's Rules)

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The Borough of Roselle Park, New Jersey (Roselle Park) filed an application and request for waiver to operate on three 470-512 MHz band (T-Band) frequency pairs in the television (TV) Channel 20 band (506-512 MHz).¹ Specifically, Roselle Park requests a waiver to short-space its proposed base station to adjacent channel TV Station WLIW, Channel 21, Garden City, New York, and co-channel TV Station WCCT-TV (formerly WTXN), Channel 20, Waterbury, Connecticut.² Roselle Park also requests a waiver because it proposes to operate more than 80 kilometers (50 miles) outside Philadelphia, Pennsylvania, the maximum distance allowed under the Commission's rules.³ For the reasons stated below, we deny the Waiver Request and dismiss the application.

II. BACKGROUND

2. In support of its waiver request, Roselle Park states that it initially sought the assistance of a frequency coordinator to obtain a frequency in the 450-470 MHz band, but was informed by the coordinator that there were no available 450-470-MHz frequencies in New Jersey.⁴ Roselle Park states that access to Channel 20 T-Band frequencies would enable it to serve its own community and to communicate with two neighboring police and fire departments that use T-Band.⁵

¹ File No. 0002932068 (filed Mar. 2, 2007, amended Mar. 10, 2011 and Mar. 11, 2011) and accompanying Waiver Request and Engineering Exhibit (Waiver Request).

² See Waiver Request at 1. 47 C.F.R. § 90.309 governs co-channel separation, while the applicable rule for adjacent channel separation is 47 C.F.R. § 90.307(d).

³ See Waiver Request at 1; see also 47 C.F.R. § 90.305(a). Roselle Park's proposed base station is located 109.6 kilometers from the Philadelphia center point coordinates. Waiver Request at 1.

⁴ See File No. 0002932068, attached Letter from Warren Wielgus, Chief of Police and Robert Tobe, Fire Chief, to the Federal Communications Commission (dated Dec. 18, 2006).

⁵ *Id.*

III. DISCUSSION

3. On February 22, 2012, the President signed the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) into law.⁶ Section 6103 of the Spectrum Act provides that, not later than nine years after the date of enactment, the Commission shall reallocate T-Band spectrum “currently used by public safety eligibles.”⁷ On April 26, 2012, the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau (Bureaus) issued a public notice announcing a limited suspension of the acceptance and processing of certain T-Band applications.⁸ The *Suspension Notice* suspended the acceptance and processing of T-Band applications “in order to stabilize the existing spectral landscape while the Commission considers issues surrounding future use of the T-Band, solicits input from interested parties, and works to implement the directives of the Act.”⁹ In the *Suspension Notice*, the Bureaus stated that they would not accept or process applications “that would, if granted, tend to increase the degree to which the 470-512 MHz band is currently licensed,” including applications for new licenses.¹⁰

4. In light of the Spectrum Act and in accordance with the *Suspension Notice*, we find that Roselle Park’s application would, if granted, increase the degree to which the T-Band is currently licensed because the application is for a new license. We further find that Roselle Park has not stated sufficient grounds to justify a waiver of the *Suspension Notice*. Therefore, we deny Roselle Park’s waiver request and dismiss the application.¹¹

IV. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, that the Waiver Request associated with application File No. 0002932068, filed by the Borough of Roselle Park, New Jersey on March 2, 2007, as amended, IS DENIED.

6. IT IS FURTHER ORDERED that application File No. 0002932068 IS DISMISSED consistent with this *Order* and the Commission’s rules.

⁶ See Pub. L. No. 112-96, 126 Stat. 156 (2012) (Spectrum Act).

⁷ Spectrum Act, § 6103(a). The Act further instructs the Commission to “begin a system of competitive bidding under Section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) to grant new initial licenses for the use of the spectrum.” *Id.* It also provides that “relocation of public safety entities from the T-Band Spectrum” shall be completed not later than two years after completion of the system of competitive bidding. *Id.*, § 6103(b), (c).

⁸ Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Suspend the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (T-Band) Spectrum, *Public Notice*, 27 FCC Rcd 4218 (WTB/PSHSB 2012) (*Suspension Notice*).

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

¹¹ Notwithstanding our decision in this *Order*, Roselle Park may have recourse to the waiver provisions in Section 1.925 of the Commission’s rules to request waiver of the *Suspension Notice*. See *Suspension Notice* at 2 n. 4. Any such request must be based on careful review of the rule’s criteria for a waiver and must provide complete support, including but not limited to documentation, demonstrating that applicant meets the criteria set out in the rule. *Id.*

7. We take this action under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau



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DA 12-1192

Release Date: July 25, 2012

**OFFICE OF MANAGING DIRECTOR ANNOUNCES REVISED DEBT COLLECTION
PROCESS FOR DELINQUENT CONTRIBUTORS TO THE UNIVERSAL SERVICE FUND,
THE TELECOMMUNICATIONS RELAY SERVICES FUND AND THE NORTH AMERICAN
NUMBERING PLAN**

**WC DOCKET NOS. 05-196, 06-122, 10-191; CC DOCKET NO. 92-237;
CG DOCKET NO. 03-123**

Under the Debt Collection Improvement Act of 1996 (DCIA),¹ the Federal Communications Commission (the Commission) and its reporting components² – including the Universal Service Fund (USF), the Telecommunications Relay Services Fund (TRS Fund) and the North American Numbering Plan (NANP) (collectively, the Funds)³ – are required to transfer debts owed to the Commission to the Financial Management Service (FMS) of the U.S. Department of Treasury for further collection efforts.⁴ The administrators of the Funds assess interest, penalties, and administrative charges for collection on delinquent contributions,⁵ and they apply DCIA procedures.⁶

¹ Pub.L. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996), as amended, and codified at 31 U.S.C. §§ 3711, 3716, 3717; 31 C.F.R. § 285.12, 31 C.F.R. §§ 900 – 904; and 47 C.F.R. § 1.1901, *et seq.*

² 47 C.F.R. § 1.1901(b).

³ The Commission has delegated the administration of the collection of contributions for the Universal Service Fund (USF), the Telecommunications Relay Service Fund (TRS Fund) and the North American Numbering Plan (NANP) to outside administrators (collectively, the Funds). The Universal Service Administrative Company (USAC) administers the USF. *See* Changes to the Board of Directors of the National Exchange Carrier Association, Inc., and Federal-State Board on Universal Service, CC Docket Nos. 97-21 and 96-45, 12 FCC Rcd 18400, *Report and Order and Second Order on Reconsideration* (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., and Federal-State Board on Universal Service, 13 FCC Rcd 25058, *Third Report and Order* in CC Docket No. 97-21, *Fourth Order on Reconsideration* in CC Docket 97-21 and *Eighth Order on Reconsideration* in CC Docket No. 96-45 (1998). Welch LLP is the billing and collection agent for the NANP. *Federal Communications Commission Selects Welch & Company LLP As the Next North American Numbering Plan Billing and Collection Agent*, CC Docket Nos. 92-237, 99-200, News Release (April 12, 2004). Rolka Loube Saltzer & Associates (RLSA) began administering the Interstate Telecommunications Relay Services (TRS) Fund under contract at the start of the 2011-2012 TRS Fund year. *FCC Names New Administrator of Interstate TRS Fund*, News Release (April 6, 2011).

⁴ 31 U.S.C. §§ 3711, 3716, 3717; 31 C.F.R. § 285.12, 31 C.F.R. §§ 900 – 904; and 47 C.F.R. § 1.1901, *et seq.*

⁵ *See* 31 U.S.C. § 3717(e); 47 C.F.R. §§ 1.1940, 1.1941; 54.711(a), 54.713, 54.713(b).

⁶ 31 U.S.C. §§ 3701-02; 3711-20; 31 C.F.R. § 285.12.

Previously, the Commission provided a courtesy notice to each delinquent debtor before transferring to FMS delinquent debts for collection. The Commission no longer provides that notice; rather, each Fund administrator furnishes notification reminding contributors of the consequences of failing to pay the full amount due. This change to the process will result in a more efficient and effective method for the collection of debts owed to the Commission. Furthermore, the new process will allow for the transfer of delinquent debts to FMS in a more timely manner. Accordingly, each administrator will directly transfer legally enforceable delinquent debts⁷ directly to FMS at any time after such notification, but must transfer the debt that has been delinquent 180 days.⁸ The FMS will assess additional administrative charges for collection.⁹

For further information, please contact Cheryl Collins, Chief, Revenue and Receivable Operations Group, Financial Operations, Office of the Managing Director, at 202-418-1995.

- FCC -

⁷ A debt is legally enforceable if there has been a final agency determination that the debt, in the amount stated, is due and there are no legal bars to collection action. Where, for example, a debt is the subject of a pending administrative review process required by statute or regulation and collection action during the review process is prohibited, the debt is not considered legally enforceable for purposes of mandatory transfer to FMS and is not to be transferred even if the debt is more than 180 days past due. 31 C.F.R. § 285.12(c)(3)(i).

⁸ 31 C.F.R. § 285.12(f). The administrator must transfer any legally enforceable debt that is more than 180 days past due. 31 C.F.R. § 285.12(c)(1).

⁹ 31 C.F.R. § 285.12(f), (j).



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET S.W.
WASHINGTON D.C. 20554

News media information 202-418-0500
Internet: <http://www.fcc.gov> (or <ftp.fcc.gov>)
TTY (202) 418-2555

DA No. 12-1193

Report No. TEL-01570

Thursday July 26, 2012

International Authorizations Granted

Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests

The following applications have been granted pursuant to the Commission's streamlined processing procedures set forth in Section 63.12 of the Commission's rules, 47 C.F.R. § 63.12, other provisions of the Commission's rules, or procedures set forth in an earlier public notice listing applications accepted for filing.

Unless otherwise noted, these grants authorize the applicants (1) to become a facilities-based international common carrier subject to 47 C.F.R. § 63.22; and/or (2) to become a resale-based international common carrier subject to 47 C.F.R. § 63.23; or (3) to exceed the 25 percent foreign ownership benchmark applicable to common carrier radio licensees under 47 U.S.C. § 310(b)(4).

THIS PUBLIC NOTICE SERVES AS EACH NEWLY AUTHORIZED CARRIER'S SECTION 214 CERTIFICATE. It contains general and specific conditions, which are set forth below. Newly authorized carriers should carefully review the terms and conditions of their authorizations. Failure to comply with general or specific conditions of an authorization, or with other relevant Commission rules and policies, could result in fines and forfeitures.

Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules in regard to the grant of any of these applications may be filed within thirty days of this public notice (see Section 1.4(b)(2)).

An updated version of Sections 63.09–.25 of the rules, and other related sections, is available at <http://www.fcc.gov/ib/pd/pf/telecomrules.html>.

For additional information, please contact the FCC Reference and Information Center, Room CY-A257, 445 12th Street SW, Washington, D.C. 20554. (202) 418-0270.

ITC-214-20111108-00344 E GSH COMMUNICATIONS LLC

International Telecommunications Certificate

Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service

Grant of Authority

Date of Action: 07/21/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

We grant the Petition to Adopt Conditions to Authorizations and Licenses filed in the proceeding on July 20, 2012, by the Department of Justice (DOJ) and the Department of Homeland Security. Accordingly, we condition grant of this application on GSH Communications LLC abiding by the commitments and undertakings set forth in the July 5, 2012 Letter of Assurance (LOA) from the President of GSH Communications LLC to Assistant Attorney General, National Security Division, DOJ. The Petition and the LOA may be viewed on the FCC's website through the International Bureau Filing System (IBFS) by searching for ITC-214-20111108-00344 and accessing the "Other Filings related to this application" from the Document Viewing Area.

ITC-214-20120204-00043 E XYZ Telecom Corporation
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/10/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120531-00146 E Dorial Telecom, LLC
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 06/22/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120612-00159 E Pinnacle Telecommunications Group, LLC.
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/06/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120613-00155 E Chronicles 410 Inc.
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/06/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120619-00163 E Neutrona Networks International LLC d/b/a IFX International Carrier Services
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/20/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120622-00161 E GoGo Telecom, LLC
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/20/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120628-00160 E Dial Tone USA, Inc.
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/20/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20120703-00169 E Distaphone Group LLC
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 07/20/2012

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-T/C-20120621-00166 E Buckeye TeleSystem, Inc.
Transfer of Control
Grant of Authority Date of Action: 07/25/2012

Current Licensee: Buckeye TeleSystem, Inc.

FROM: Allan J. Block; John R. Block; and The Maxine H. Block Marital Trust No. 2, Will

TO: A. Block; J. Block; And Family Trust No. 2, W. Block Jr., as Chm of the Trustees

Notification filed June 21, 2012 of the pro forma transfer of control of international section 214 authorization, ITC-214-19981117-00803, held by Buckeye TeleSystem, Inc. (Buckeye), from Allan J. Block, John R. Block, and the Maxine H. Block Marital Trust No. 2, to A. Block, Family Trust No. 2, and W. Block Jr., as Chairman of the Trustees, effective May 21, 2012. Buckeye is a wholly-owned subsidiary of Block Communications, Inc. (BCI), a corporation controlled by the Block family. The terms of the Maxine Block Marital Trust No. 2, which held a 25% ownership interest in BCI, provided that upon death of Maxine Block the assets of the Trust would be allocated to a new family trust -- Family Trust No. 2. The other 75% ownership in BCI, held by members of the Block family and family trusts, was unaffected.

ITC-T/C-20120627-00164 E Aircell Business Aviation Services LLC
Transfer of Control
Grant of Authority Date of Action: 07/25/2012

Current Licensee: Aircell Business Aviation Services LLC

FROM: Gogo Inc.

TO: Gogo Intermediate Holdings LLC

Notification filed June 27, 2012 of the pro forma transfer of control of international section 214 authorization, ITC-214-20111206-00360, held by Aircell Business Aviation Services LLC (Aircell), from Gogo Inc., the 100% parent of Aircell, to Gogo Intermediate Holdings LLC, a wholly-owned subsidiary of Gogo Inc., effective June 14, 2012.

ITC-T/C-20120705-00179 E Western Long Distance, Inc.
Transfer of Control
Grant of Authority Date of Action: 07/25/2012

Current Licensee: Western Long Distance, Inc.

FROM: The Current Shareholders of Whidbey Telephone Company

TO: The Shareholders of Whidbey Telephone Company

Notification filed July 5, 2012, of the pro forma transfer of control of international section 214 authorization, ITC-214-20000315-00172, held by Western Long Distance Inc. (Western LD) effective June 12, 2012. Western LD is a wholly-owned subsidiary of Whidbey Telephone Company (WTC), which is closely held family business owned and operated by the Henny family. On June 12, 2012, ownership of WTC was transferred from the David Christian Henny Testamentary Trust and Marion F. Henny to the 2012 George T.F. Henny Trust, the 2012 Julia Henny DeMartini Trust and the 2012 Mark P. Henny Trust.

INFORMATIVE

ITC-214-20120222-00060 Luminus Telecom LLC

By letter filed July 9, 2012, Applicant notified the Commission of the withdrawal of its international section 214 application.

CONDITIONS APPLICABLE TO INTERNATIONAL SECTION 214 AUTHORIZATIONS

(1) These authorizations are subject to the Exclusion List for International Section 214 Authorizations, which identifies restrictions on providing service to particular countries or using particular facilities. The most recent Exclusion List is attached to this Public Notice. The list applies to all U.S. international carriers, including those that have previously received global or limited global Section 214 authority, whether by Public Notice or specific written order. Carriers are advised that the attached Exclusion List is subject to amendment at any time pursuant to the procedures set forth in Streamlining the International Section 214 Authorization Process and Tariff Requirements, IB Docket No. 95-118, 11 FCC Rcd 12884 (1996), para. 18. A copy of the current Exclusion List will be maintained in the FCC Reference and Information Center and will be available at <http://www.fcc.gov/ib/pd/pf/telecomrules.html#exclusionlist>. It also will be attached to each Public Notice that grants international Section 214 authority.

(2) The export of telecommunications services and related payments to countries that are subject to economic sanctions may be restricted. For information concerning current restrictions, call the Office of Foreign Assets Control, U.S. Department of the Treasury, (202) 622-2520.

(3) Carriers shall comply with the requirements of Section 63.11 of the Commission's rules, which requires notification by, and in certain circumstances prior notification by, U.S. carriers acquiring an affiliation with foreign carriers. A carrier that acquires an affiliation with a foreign carrier will be subject to possible reclassification as a dominant carrier on an affiliated route pursuant to the provisions of Section 63.10 of the rules.

(4) Carriers shall comply with the Commission's International Settlements Policy and associated filing requirements contained in Sections 43.51, 64.1001 and 64.1002 of the Commission's Rules, 47 C.F.R. §§ 43.51, 64.1001, 64.1002. The Commission modified these requirements most recently in International Settlements Policy Reform: International Settlement Rates, First Report and Order, FCC 04-53, 19 FCC Rcd 5709 (2004). In addition, any carrier interconnecting private lines to the U.S. public switched network at its switch, including any switch in which the carrier obtains capacity either through lease or otherwise, shall file annually with the Chief, International Bureau, a certified statement containing, on a country-specific basis, the number and type (e.g., 64 kbps circuits) of private lines interconnected in such manner. The Commission will treat the country of origin information as confidential. Carriers need not file their contracts for interconnection unless the Commission specifically requests. Carriers shall file their annual report on February 1 (covering international private lines interconnected during the preceding January 1 to December 31 period) of each year. International private lines to countries which the Commission has exempted from the International Settlements Policy at any time during a particular reporting period are exempt from this requirement. See 47 C.F.R. § 43.51(d). The Commission's list of U.S. international routes that are exempt from the International Settlements Policy may be viewed at http://www.fcc.gov/ib/pd/pf/isp_exempt.html.

(5) Carriers authorized to provide private line service either on a facilities or resale basis are limited to the provision of such private line service only between the United States and those foreign points covered by their referenced applications for Section 214 authority. A carrier may provide switched services over its authorized resold private lines in the circumstances specified in Section 63.23(d) of the rules, 47 C.F.R. § 63.23(d).

(6) A carrier may engage in "switched hubbing" to countries that do not appear on the Commission's list of U.S. international routes that are exempt from the International Settlements Policy, set forth in Section 64.1002, 47 C.F.R. § 64.1002, provided the carrier complies with the requirements of Section 63.17(b) of the rules, 47 C.F.R. § 63.17(b). The Commission's list of U.S. international routes that are exempt from the International Settlements Policy may be viewed at http://www.fcc.gov/ib/pd/pf/isp_exempt.html.

(7) Carriers shall comply with the "No Special Concessions" rule, Section 63.14, 47 C.F.R. § 63.14.

(8) Carriers regulated as dominant for the provision of a particular communications service on a particular route for any reason other than a foreign carrier affiliation under Section 63.10 of the rules shall file tariffs pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61. Carriers shall not otherwise file tariffs except as permitted by Section 61.19 of the rules, 47 C.F.R. § 61.19. Except as specified in Section 20.15 with respect to commercial mobile radio service providers, carriers regulated as non-dominant, as defined in Section 61.3, and providing detariffed international services pursuant to Section 61.19, must comply with all applicable public disclosure and maintenance of information requirements in Sections 42.10 and 42.11.

(9) Carriers shall file the annual reports of overseas telecommunications traffic required by Section 43.61(a). Carriers shall also file the quarterly reports required by Section 43.61 in the circumstances specified in paragraphs (b) and (c) of

that Section.

(10) Carriers shall file annual reports of circuit status and/or circuit additions in accordance with the requirements set forth in Rules for Filing of International Circuit Status Reports, CC Docket No. 93-157, Report and Order, 10 FCC Rcd 8605 (1995). See 47 C.F.R. § 43.82. See also §§ 63.22(e), 63.23(e). These requirements apply to facilities-based carriers and private line resellers, respectively. See also <http://www.fcc.gov/ib/pd/pf/csmanual.html>.

(11) Carriers should consult Section 63.19 of the rules when contemplating a discontinuance, reduction or impairment of service. Further, the grant of these applications shall not be construed to include authorization for the transmission of money in connection with the services the applicants have been given authority to provide. The transmission of money is not considered to be a common carrier service.

(12) If any carrier is reselling service obtained pursuant to a contract with another carrier, the services obtained by contract shall be made generally available by the underlying carrier to similarly situated customers at the same terms, conditions and rates. 47 U.S.C. § 203.

(13) To the extent the applicant is, or is affiliated with, an incumbent independent local exchange carrier, as those terms are defined in Section 64.1902 of the rules, it shall provide the authorized services in compliance with the requirements of Section 64.1903.

(14) Except as otherwise ordered by the Commission, a carrier authorized here to provide facilities-based service that (i) is classified as dominant under Section 63.10 of the rules for the provision of such service on a particular route and (ii) is affiliated with a carrier that collects settlement payments for terminating U.S. international switched traffic at the foreign end of that route may not provide facilities-based switched service on that route unless the current rates the affiliate charges U.S. international carriers to terminate traffic are at or below the Commission's relevant benchmark adopted in International Settlement Rates, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 (1997). See also Report and Order on Reconsideration and Order Lifting Stay in IB Docket No. 96-261, FCC 99-124 (rel. June 11, 1999). For the purposes of this rule, "affiliated" and "foreign carrier" are defined in Section 63.09.

Exclusion List for International Section 214 Authorizations

The following is a list of countries and facilities not covered by grant of global Section 214 authority under Section 63.18(e)(1) of the Commission's Rules, 47 C.F.R. § 63.18(e)(1). In addition, the facilities listed shall not be used by U.S. carriers authorized under Section 63.18 of the Commission's Rules unless the carrier's Section 214 authorization specifically lists the facility. Carriers desiring to serve countries or use facilities listed as excluded hereon shall file a separate Section 214 application pursuant to Section 63.18(e)(3) of the Commission's Rules. See 47 C.F.R. § 63.22(c).

Countries:

Cuba (Applications for service to Cuba shall comply with the separate filing requirements of the Commission's Public Notice, DA 10-112, dated January 21, 2010, "Modification of Process to Accept Applications for Service to Cuba and Related Matters.")

Facilities:

All non-U.S.-licensed satellite systems that are not on the Permitted Space Station List, maintained at <http://www.fcc.gov/ib/sd/se/permitted.html>. See International Bureau Public Notice, DA 99-2844 (rel. Dec. 17, 1999).

This list is subject to change by the Commission when the public interest requires. Before amending the list, the Commission will first issue a public notice giving affected parties the opportunity for comment and hearing on the proposed changes. The Commission may then release an order amending the exclusion list. This list also is subject to change upon issuance of an Executive Order. See Streamlining the Section 214 Authorization Process and Tariff Requirements, IB Docket No. 95-118, FCC 96-79, 11 FCC Rcd 12,884, released March 13, 1996 (61 Fed. Reg. 15,724, April 9, 1996). A current version of this list is maintained at <http://www.fcc.gov/ib/pd/pf/telecomrules.html#exclusionlist>.

For additional information, contact the International Bureau's Policy Division. (202) 418-1460.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Allband Communications Cooperative) WC Docket No. 10-90
Petition for Waiver of Certain High-Cost)
Universal Service Rules)

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant in part and dismiss as moot in part a petition filed by Allband Communications Cooperative (Allband or Company) for a waiver of section 54.302 of the Commission's rules, which established a \$250 per line per month cap on high-cost universal service support ("\$250 cap"), and section 36.621(a)(5) of the Commission's rules, which limits reimbursement of capital and operating costs from high-cost loop support (HCLS).¹ For the reasons discussed below, we grant Allband a waiver of section 54.302 for three years to provide it additional time to take cost-cutting and revenue-enhancing actions in order to improve its financial position and lessen its dependence on high-cost universal service support.

II. BACKGROUND

2. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service funding for high-cost, rural areas, adopting fiscally responsible, accountable, incentive-based policies to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund.² Among other things, the Commission imposed a presumptive per line cap of \$250 per month on total high-cost universal service support for all eligible telecommunications carriers and found that support in excess of the \$250 cap should not be provided without further justification.³ Consistent with the Commission's goal to provide reasonable transitions so companies affected by reform have time to adapt to changing circumstances,⁴ the Commission phased in the \$250 cap over three years.⁵ From July 1, 2012 through June 30, 2013, carriers will receive no more than \$250 per line per month plus two-thirds of the difference between their uncapped per-line amount and \$250. From July 1, 2013 through June 30, 2014, carriers will receive no more than \$250 per line per

¹ Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition); see also *Connect America Fund* et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); 47 C.F.R. §§ 54.302, 36.621(a)(5).

² *USF/ICC Transformation Order*, 26 FCC Rcd at 17670, para. 11.

³ *Id.* at 17765, para. 274.

⁴ *Id.* at 17671, para. 11.

⁵ *Id.* at 17765, para. 275.

month plus one-third of the difference between their uncapped per-line amount and \$250. Beginning July 1, 2014, carriers shall receive no more than \$250 per line per month.

3. The Commission also adopted section 36.621(a)(5), the HCLS benchmarking rule, which is intended to moderate the expenses of those rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to advance broadband deployment.⁶ While the Commission set forth a framework for establishing benchmarks, the Commission delegated to the Wireline Competition Bureau (Bureau) the authority to adopt and implement a methodology within the established parameters.⁷ On April 25, 2012, the Bureau adopted the specific methodology for establishing the benchmarks within HCLS.⁸

4. The Commission also instituted a waiver process to allow “any carrier negatively affected by the universal service reforms ... to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service.”⁹ The Commission stated that it did not “expect to grant waiver requests routinely,” and cautioned petitioners that any requests would be subject to a “rigorous, thorough, and searching review comparable to a total company earnings review.”¹⁰ The Commission also noted that it did not anticipate granting waivers of the \$250 cap for an undefined duration, but would expect carriers to periodically re-validate any need for support above the \$250 cap.¹¹ According to the Commission, even if a carrier demonstrates the need for funding above the \$250 cap, that carrier is only entitled to the amount above the \$250 cap that it can show is necessary, not the amount it was previously receiving.¹² The Commission provided guidance on the types of information that would be relevant for such waiver requests and delegated authority to the Bureau and the Wireless Telecommunications Bureau to rule on all such requests.¹³

III. ALLBAND’S PETITION

5. On February 3, 2012, Allband filed a petition for waiver.¹⁴ Allband requests waiver of sections 54.302 and 36.621(a)(5) of the Commission’s rules. Allband asserts that absent the requested waivers, it will be unable to: 1) provide voice service to any of its customers; 2) pay the principal and interest on its Rural Utilities Service loan; and 3) continue operations as a telecommunications carrier.¹⁵

6. Allband was formed in 2003 as a non-profit member cooperative to serve an unserved, remote area in the lower peninsula of Michigan. In 2005, the Commission recognized Allband as an incumbent local exchange carrier (LEC) and allowed it to become a member of the National Exchange Carrier Association (NECA) and to participate in NECA intercarrier compensation tariffs and pools and

⁶ *Id.* at 17741-47, paras. 210-26.

⁷ *Id.* at 17744, para. 217.

⁸ *See generally Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) (*HCLS Benchmarks Order*).

⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540.

¹⁰ *Id.* at 17840, para. 540.

¹¹ *Id.* at 17766, para. 278.

¹² *Id.*

¹³ *Id.* at 17840-42, paras. 542, 544.

¹⁴ *Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs*, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition).

¹⁵ Petition at 1.

to receive federal USF support.¹⁶ The Rural Utilities Service (RUS), an agency of the U.S. Department of Agriculture, provided loans to Allband totaling approximately \$8 million to construct telecommunications facilities.¹⁷

7. Allband states that it currently serves 163 lines and has a customer density of 1.09 lines per square mile.¹⁸ Prior to the issuance of the *USF/ICC Transformation Order*, Allband received \$714 per line per month.¹⁹ According to Allband, federal universal service fund (USF) revenues from the high-cost program constitute 84 percent of Allband's total regulated and unregulated revenues and that at full transition the \$250 cap would reduce Allband's regulated revenues by 55 percent.²⁰ Allband notes that the RUS loan covenant requires that it at least have sufficient revenues to pay the interest on the RUS loans.²¹ Allband contends that it will be unable to make a full annual RUS loan payment, even in the first year of the phase-in of the \$250 cap.²² Allband states that, at best, it will only be able to pay the interest on the loan.²³

8. Allband contends that this revenue loss cannot be made up through rate increases to local customers. According to Allband, its basic local exchange service rate currently is \$19.90 per month,²⁴ and if local customer rates were to increase to compensate for the lost federal USF revenues resulting from the \$250 cap, the total monthly rate would have to increase to \$174.90 in the first year of the phase-in, to \$329.90 in the second year of the phase-in period, and to \$484.90 by the end of the phase-in period.²⁵ Allband also contends that it cannot recover the lost revenues from either its switched intercarrier compensation rates or the Michigan universal service fund.²⁶ Allband notes that federal USF revenues provide \$1,396,728 annually, while non-regulated revenue sources only provide \$76,215 annually.²⁷ In its petition, Allband also estimated that it would lose \$398,435 annually in federal USF support as a result of the HCLS benchmarking rule, based on the methodology set forth in the *Further Notice of Proposed Rulemaking*.

9. The Bureau sought comment on Allband's Petition on February 13, 2012.²⁸ The National Telecommunications Cooperative Association (NTCA) and the National Cable & Telecommunications Association (NCTA) filed comments. NTCA supports Allband's petition, contending that Allband has demonstrated that absent a waiver, it is not financially viable and rural customers would lose service or

¹⁶ *Id.* at 2-3 (citing *In the Matter of Allband Communications Cooperative for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, 20 FCC Rcd 13566 (2005)).

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 2, fn. 4.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 6.

²¹ *Id.* at 7.

²² *Id.*

²³ The full annual loan payment is \$638,147, of which \$324,576 is interest. *Id.*

²⁴ *Id.* at 8 (citing *USF/ICC Transformation Order* at ¶ 234 to ¶ 247). Allband's high-speed internet service rate is \$34.99 per month. Petition at Appendix 2, p. 7.

²⁵ *Id.* at 8.

²⁶ *Id.* at 7.

²⁷ *Id.* at 10.

²⁸ See *Wireline Competition Bureau Seeks Comment on Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Public Notice, DA 12-204 (Feb. 13, 2012) (seeking comments by March 14, 2012 and reply comments by March 29, 2012).

incur massive increases in end-user charges.²⁹ NTCA also argues that there is good cause to waive the Commission's rules, noting that 1) Allband's network is new and largely undepreciated; 2) Allband has minimal staff, which perform multiple functions and are paid reasonable wages; and 3) Allband's board members volunteer their time and receive no compensation.³⁰ NTCA, in its filing, states that it does not have a position on Allband's request, but wishes to address issues regarding the waiver process itself.³¹ On March 29, 2012, Allband filed reply comments.³² On June 25, 2012, Allband filed supplemental information in support of its petition.³³ Allband's filing provided more detail regarding various transactions which were discussed in its initial filing. On June 27, 2012, Allband filed a request for immediate, permanent stay of section 54.302 in which it reiterated all of its arguments in its petition seeking waiver and set forth its arguments of why a stay would be warranted.³⁴ On July 24, 2012, Allband filed supplemental information in support of its petition.³⁵

IV. DISCUSSION

10. We conclude that Allband has demonstrated that there is good cause to grant a waiver of section 54.302 of the Commission's rules for three years.³⁶ Based upon a thorough review of the information provided by Allband, including its financial statements, we conclude that a limited waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service in areas where there is no terrestrial alternative.³⁷

11. We find that special circumstances support Allband's waiver request. Unlike many other incumbent telephone companies, Allband is a relatively new company, and therefore has significant start-

²⁹ NTCA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 2 (filed Mar. 14, 2012).

³⁰ *Id.* at 3-4.

³¹ NTCA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 3 (filed Mar. 14, 2012). NTCA contends that the Commission should make it clear that the overall \$4.5 billion budget, and the automatic steps that are triggered if demand for support exceeds the budget, will continue even if waivers are granted. *Id.* at 3-4. NTCA also argues that the Commission should not assume that increasing high-cost support levels is the only way to address a carrier's concerns regarding the application of the cap.³¹ NTCA states that the Commission should consider whether there are any cost savings or efficiency gains that might be possible. *Id.* at 4. NTCA also claims that the Commission and RUS should work together to address troubled loans. *Id.* at 5. Finally, NTCA argues that the waiver process should be completely transparent. *Id.* at 5-7.

³² Allband Reply Comments, WC Docket No. 10-90, WT Docket No. 10-208 (filed March 29, 2012) (Reply Comments).

³³ Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Supplemental Filing).

³⁴ Allband Petition for Stay, WC Docket No. 10-90, WT Docket No. 10-208 (filed June 27, 2012) (Stay Petition).

³⁵ Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Second Supplemental Filing).

³⁶ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. In this context, the Commission has made clear that it envisions granting waivers "only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service." *USF/ICC Transformation Order*, 26 FCC Red at 17840, para. 540.

³⁷ *USF/ICC Transformation Order*, 26 FCC Red at 17839-40, para. 540.

up costs and undepreciated plant. Allband serves a remote, heavily forested and unserved area in the lower peninsula of Michigan, including portions of four counties that previously had no service.³⁸ Allband's service territory is difficult to serve and has very few customers.³⁹ Allband was formed as a nonprofit in 2003 because no other service provider was willing to provide service to the area.⁴⁰

12. We also find that the public interest would be served by granting a waiver for a limited period of time. Specifically, we find that the record supports Allband's claims that consumers in the area will not be able to continue to receive voice service, absent a waiver in the near-term. In reviewing Allband's financial statements, it appears that the management of Allband is mindful of its expenses and limited financial resources given the size of its business. For example, in our view, the salaries and wages of Allband's seven employees are modest.⁴¹ Similarly, while certain other expenses, such as legal, accounting, and insurance are ongoing and an unavoidable cost of doing business, Allband's level of expenses, on a total dollar basis, are reasonable given the size and age of Allband's operation.⁴² Accordingly, we find that Allband is not in a position to immediately reduce its expenses in these areas. Similarly, given the low population density in Allband's service territory, Allband also will not be in a position to increase its revenues from consumers in the short-term.

13. Nevertheless, consistent with the Commission's direction,⁴³ we do not find it to be in the public interest to grant Allband an unlimited waiver of the monthly per-line limits adopted by the Commission, either in terms of the amount of support provided, or the duration of additional support. While a waiver is appropriate for a discrete period of years given the size and age of Allband's operation, it would be appropriate to reassess its financial condition to determine whether a waiver remains necessary in the future. We would be concerned if Allband's support continues to be significantly greater than the Commission's per-line limit as Allband's operation matures.

14. Therefore, we grant Allband a limited waiver of section 54.302 of the Commission's rules for a period of three years to give Allband a sufficient but not undue amount of time to make a good faith effort to come into compliance with the \$250 cap. During this time, we expect Allband to actively pursue any and all cost cutting and revenue generating measures in order to reduce its dependency on federal high-cost USF support. Specifically, we anticipate that Allband, during this three-year waiver period, will continue efforts to expand its subscriber base to the extent possible⁴⁴ and lower its support needs on a per-line basis, while at the same time taking all necessary steps to reduce its total costs as the company matures. We further note that Allband has expressed its willingness, if necessary, to work with RUS to rework its loan terms.⁴⁵ We envision that this is just one of the steps Allband may take to improve its financial position. Moreover, even if Allband cannot meet the cap in the next three years, a possibility we discuss further below,⁴⁶ the financial information garnered during that time period will enable both Allband and the Bureau to determine what further steps are necessary to reach that goal. The

³⁸ Petition at 2-3.

³⁹ According to Allband, the Company currently serves 163 lines and has a customer density of 1.09 lines per square mile. *Id.* at 2, n. 4.

⁴⁰ See *Id.* at 6.

⁴¹ See *Id.* at Appendix 2, page 5.

⁴² *Id.* at 6. We also note that no party disputed the factual evidence presented by Allband or objected to its request for a waiver.

⁴³ *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

⁴⁴ According to Allband, the Company currently has a telephone penetration rate of 69 percent and an internet penetration rate of 36 percent. See, Allband Second Supplemental Filing.

⁴⁵ Petition at 5-6.

⁴⁶ See *infra* para. 16.

three-year waiver also will coincide with the three-year phase-in of the \$250 cap for other carriers. Thus, at the end of the waiver period, the Bureau will not only have available for its consideration Allband's financial information, but the financial information from other carriers who are subject to the \$250 cap and will be able to use this data for comparison purposes.

15. We also implement the limited waiver in a manner designed to ensure that Allband does not receive more high-cost support than necessary. Specifically, effective July 1, 2012 and until June 30, 2015, we grant Allband a waiver of section 54.302 so that it may receive the lesser of high-cost universal service support based on its actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012.⁴⁷ That is, as Allband takes steps to reduce its costs and increase penetration, as described above, we expect that it will receive less support.

16. At the end of the waiver period, both Allband and the Bureau will be in a better position to determine if Allband will need further relief. If, after taking all reasonable steps to improve its financial position, Allband determines that it still needs additional support above the \$250 cap after June 30, 2015, Allband should file with the Bureau the financial and operational information necessary for the Bureau to determine what further relief is appropriate based on the specific circumstances present at that time. This could include a further waiver or the initiation of a phase-in period (e.g., phasing down to the \$250 cap over an additional three years). This filing, if necessary, shall be made no later than six months prior to the expiration of the three-year waiver period. In that event, Allband should provide its 2012 and 2013 financial statements, documentation of steps taken to improve its financial position, and any other information it deems necessary for the Bureau to evaluate the need for renewal of the waiver in whole or in part. We also would expect Allband to provide its 2014 financial statements as soon as they become available, prior to the expiration of the current waiver. As with any company considering filing a petition for waiver of these rules, Allband is encouraged to communicate with the Bureau in advance of any future filing to ensure that only necessary information is provided to the Bureau in order to accelerate review of the petition.

17. Finally, with regard to Allband's request that the Commission waive the benchmarking rule to limit HCLS for capital and operating costs, we conclude that this request is moot. We note that under the specific methodology ultimately adopted by the Bureau, which occurred after Allband filed its petition, Allband is not capped.⁴⁸ Therefore, the Bureau dismisses Allband's request for a waiver of the benchmarking rule as moot.

18. With regard to Allband's request for a stay of section 54.302, we find that in light of our decision to grant the limited waiver of section 54.302, Allband cannot demonstrate that it will suffer irreparable harm in the near future.⁴⁹ Therefore, the Bureau denies Allband's request for a stay of section 54.302.

⁴⁷ This restriction on Allband's funding level is in keeping with the Commission's directive that a carrier is only entitled to the amount above the cap they can show is necessary, not the amount they were previously receiving. *USF/ICC Transformation Order*, 26 FCC Red at 17766, para. 278.

⁴⁸ See *Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) at Appendix B, p. 47.

⁴⁹ A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only irreparable harm). Allband also has not persuaded us that the other stay criteria are met here, either.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to sections 1.4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this order IS ADOPTED.

20. IT IS FURTHER ORDERED that the petition for waiver of section 54.302 of the Commission's rules, 47 C.F.R. § 54.302, and the benchmarking rule to limit reimbursements for capital and operating costs, filed by Allband Communications Cooperative, IS GRANTED IN PART, DENIED IN PART, AND DISMISSED AS MOOT IN PART as described herein.

21. IT IS FURTHER ORDERED that the petition for stay, filed by Allband Communications Cooperative, IS DENIED as described herein.

22. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Ira Jones	)	File Number: EB-10-SF-0187
	)	NAL/Acct. No.: 201132960001
Merced, California	)	FRN: 0020643425
)	

FORFEITURE ORDER

Adopted: July 26, 2012**Released: July 27, 2012**

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Ira Jones, owner and operator of a Citizens Band (CB) radio station in Merced, California, for willfully and repeatedly violating Section 303(n) of the Communications Act of 1934, as amended (Act),¹ and Section 95.426(a) of the Commission's rules (Rules),² by failing to permit an inspection of his CB radio station by an authorized FCC representative. The noted violations involved Mr. Jones' refusal to allow an inspection of his CB radio station despite multiple requests.

II. BACKGROUND

2. On March 19, 2010, agents from the Enforcement Bureau's San Francisco Office (San Francisco Office) responded to a complaint regarding radio frequency interference within the radio communication system equipment of the Merced County Fire Department.³ The agents then monitored the radio transmissions on frequency 27.165 MHz and used radio direction finding techniques to locate the source of the signal associated with the interference to a CB radio station operating from Mr. Jones' residence in Merced, California. The San Francisco agents monitored frequency 27.165 MHz again on March 26, 2010, and located the interference to a CB radio station operating from Mr. Jones's residence in Merced, California. Later the same day, the agents approached Mr. Jones' residence, knocked on his door, identified themselves as agents of the FCC and presented their official badges and credentials. The individual answering the door identified himself as Mr. Jones. The agents told him about the radio frequency interference complaint and asked him if he was the owner or operator of the CB radio station.

¹ 47 U.S.C. § 303(n).

² 47 C.F.R. § 95.426(a) (CB Rule 26).

³ The agents observed that transmissions on CB radio station frequency 27.165 MHz appeared to match the audio distortion received on frequency 154.4 MHz within the Merced County Fire Department's audio receiver and speaker system in what appeared to be audio rectification interference within the department's receiver and speaker system. *Audio rectification* interference occurs when an electronic circuit (usually an amplifier), which ideally should respond only to audio frequency signals, responds to external radio frequency (RF) signals. Typically, the circuit picks up signals from a nearby radio transmitter in addition to the sound the listener wants to hear. The unwanted signal may be constant or intermittent, faint or uncontrollably loud.

Mr. Jones acknowledged that he was the operator of the CB radio station but denied causing any interference to the Merced County Fire Department. The agents then requested that they be allowed to inspect the CB radio station to determine the cause of the interference. Mr. Jones denied the agents' request. The agents warned Mr. Jones that refusing to allow an inspection of a CB radio station is a violation of Section 95.426(a) of the Rules⁴ and Section 303(n) of the Act,⁵ explaining that these rules require CB operators to make their stations available to authorized FCC representatives for inspection. Mr. Jones again denied the request and asserted that the FCC must have a search warrant to inspect his CB station. The agents advised Mr. Jones that he was required to take necessary precautions to avoid causing radio interference by operating at power levels that do not exceed legal limits and by refraining from using a radio frequency power amplifier.

3. Prior to leaving the premises, the agents issued an on-scene Notice of Unlicensed Operation to Mr. Jones.⁶ The First Notice expressly warned that Mr. Jones's refusal to allow inspection of his radio equipment violated Section 303(n) of the Act and included the full text of Section 303(n). Mr. Jones refused to accept a copy of the First Notice and the agents left the document on a chair near the front door of the house. The agents then left the premises, but continued to monitor 27.165 MHz and heard Mr. Jones describe the agents' attempted inspection.⁷

4. On August 27, 2010, in response to a subsequent complaint from the Merced County Fire Department that the interference to its radio communication equipment had resumed, San Francisco agents again monitored frequency 27.165 MHz and located the source of the interfering signal to a CB radio station operating from Mr. Jones's residence in Merced, California. Later the same day, the agents, along with two Merced City police officers, approached Mr. Jones at his front yard, identified themselves as FCC agents, and presented their official badges and credentials. The two Merced City police officers identified the man as Mr. Jones. The agents told Mr. Jones about the radio frequency interference complaint and requested that they be allowed to inspect the CB radio station to determine the cause of the interference. Mr. Jones denied the request. Mr. Jones again admitted that he was the owner and operator of the CB radio station, but stated that he was not the owner of the house and that he had to refuse the inspection. The agents explained to Mr. Jones that refusal to allow an inspection could result in a \$7,000 forfeiture assessment, and Mr. Jones said that he understood. After further conversation with the agents and the police officers, Mr. Jones subsequently admitted to being the owner of the house. The agents again requested that they be allowed to inspect the CB radio station and reiterated that Mr. Jones's refusal to allow an inspection of a CB radio station was a violation of Section 95.426(a) of the Rules and Section 303(n) of the Act and subject to a forfeiture. Mr. Jones again denied the inspection request. The agents then gave Mr. Jones an oral warning and issued a second on-scene Notice of Unlicensed Operation to him.⁸ Mr. Jones again refused to accept a copy of the Second Notice and the agents left the document on a wooden yard border. The agents then left the premises.⁹

⁴ 47 C.F.R. § 95.426(a) (CB Rule 26).

⁵ 47 U.S.C. § 303(n).

⁶ *Ira Jones*, On-Scene Notice of Unlicensed Operation (Enf. Bur. San Francisco Office, issued on-scene March 26, 2010) (First Notice).

⁷ Later on March 26, 2010, the agents again monitored frequency 27.165 MHz and noted that Mr. Jones was operating his CB radio station without causing interference to the Merced County Fire Department radio communication equipment. Subsequently, the Merced County Fire Department reported that the interference ceased.

⁸ *Ira Jones*, On-Scene Notice of Unlicensed Operation (Enf. Bur. San Francisco Office, issued on-scene August 27, 2010) (Second Notice). The Second Notice also expressly warned that Mr. Jones's refusal to allow inspection of his radio equipment violated Section 303(n) of the Act and included the full text of Section 303(n).

⁹ On September 1, 2010, the San Francisco Office received another complaint from the Merced County Fire

5. On March 10, 2011, the San Francisco Office issued a Notice of Apparent Liability for Forfeiture (*NAL*) in the amount of \$7,000 to Mr. Jones for failing to allow authorized FCC personnel to inspect his CB radio station.¹⁰ Mr. Jones responded to the *NAL* on March 30, 2011.¹¹ In his *Response*, Mr. Jones argues that he has not seen the complaints that alleged the interference, that he did not receive the described warnings from the San Francisco agents, and that the agents did not produce valid identification cards.¹²

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),¹³ Section 1.80 of the Rules,¹⁴ and the Commission's *Forfeiture Policy Statement*.¹⁵ In examining Mr. Jones' response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁶ We consider Mr. Jones' response to the *NAL* in light of these statutory factors and find that no reduction of the forfeiture is warranted.

7. Section 303(n) of the Act states that the Commission has the "authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1)."¹⁷ Section 307(e)(1) expressly includes "the citizen band radio service."¹⁸ Additionally, Section 95.426(a) of the Rules (CB Rule 26) states "[i]f an authorized FCC representative requests to inspect your CB station, you must make your CB station and records available for inspection."¹⁹

8. On March 26, 2010 and August 27, 2010, San Francisco Office agents located the source of the signal on 27.165 MHz to Mr. Jones's residence in Merced, California. On both dates, in an effort to

Department stating that Mr. Jones had resumed CB radio station operation at approximately 5:30 p.m., and interference within the Merced County Fire Department radio communication system equipment had also resumed.

¹⁰ *Ira Jones*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 3698 (Enf. Bur. 2011) (*NAL*).

¹¹ See Response of Ira Jones (filed March 30, 2011) (*Response*) (on file in EB-10-SF-0187).

¹² See *id.* at 1–2.

¹³ 47 U.S.C. § 503(b).

¹⁴ 47 C.F.R. § 1.80.

¹⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ 47 U.S.C. § 303(n) (The Commission shall "[h]ave authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.").

¹⁸ 47 U.S.C. § 307(e)(1) ("[T]he Commission may by rule authorize the operation of radio stations without individual licenses in the . . . citizens band radio service. . . .").

¹⁹ 47 C.F.R. § 95.426(a).

determine the cause of and resolve the reported interference created to the Merced County Fire Department radio communication equipment, the agents requested an inspection of Mr. Jones's CB radio station. As described above, Mr. Jones denied both requests, despite the fact that at both inspections the San Francisco agents explained the relevant FCC requirements and provided him verbal and written on-scene warnings of the consequences of refusing to allow an inspection of a radio station.

9. Mr. Jones argues that he should not be subject to forfeiture because he has not seen a complaint from the Merced Fire department naming him as the source of the interference on frequency 27.165 MHz. This argument is irrelevant to the investigation of Mr. Jones' violation of the Commission's requirement that he make his CB station available to FCC representatives for inspection. Neither Section 303(n) of the Act nor Section 95.426(c) of the Rules requires that a complaint be filed as a prerequisite for FCC representatives to inspect a CB station. There is no question that Mr. Jones' CB equipment was the source of the complained-about interference. The agents used direction finding techniques to determine that the source of the signal associated with the interference to the Merced County Fire Department came from Mr. Jones' residence. Mr. Jones does not dispute that the San Francisco agents located the source of the interference to his house on three separate occasions.

10. Mr. Jones also alleges that the agents neither presented appropriate identification and nor gave him oral or written warnings. We find Mr. Jones' allegations unpersuasive. As discussed above, consistent with practice, the San Francisco agents approached Mr. Jones' house, presented their government-issued identification to him, and requested to conduct an inspection to determine if Mr. Jones' CB radio equipment was the source of the interference on frequency 27.165 MHz. With respect to whether Mr. Jones received any warnings, the *Response* itself includes copies of the two Notices left by the agents. Both Notices clearly state "agents of the Federal Communications Commission ("FCC") noted the following condition regarding the Citizen Band (CB) radio station located at [Mr. Jones' address]: Your refusal to allow a inspection of your radio equipment in violation of Section 303(n) of the Communications Act of 1934, as amended You are hereby warned that . . . refusal to allow inspection of your radio station constitutes violation of the Federal laws cited above and could subject the owner of this illegal operation to the severe penalties provide, including, but not limited to, substantial civil forfeitures, a maximum criminal fine of \$11,000 and/or one year imprisonment, or arrest of the equipment for the first offense."²⁰

11. Finally, Mr. Jones also appears to allege that when the San Francisco agents requested an inspection on August 27, 2010 with two Merced City police officers, one of the police officers suggested that a warrant may be necessary. Mr. Jones provides no information to support this claim and we reiterate what the San Francisco Office stated in the *NAL*: Commission agents are not required to obtain a warrant prior to conducting a radio station inspection.²¹ Accordingly, as a result of our review of Mr. Jones' *Response*, pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*, we conclude that he willfully and repeatedly violated Section 303(n) of the Act and Section 95.426(a) of the Rules, and we find that a forfeiture in the amount of \$7,000 is warranted.

²⁰ See First Notice at 1; Second Notice at 1.

²¹ See *Norfolk Southern Railway Company*, Memorandum Opinion and Order, 11 FCC Rcd 519 (CIB 1996) ("The right to inspect a station is one of the cornerstones of the FCC's ability to ensure compliance with the Communications Act and the FCC regulations."). See also *Randall R. Gaines*, Revocation Order, 72 FCC 2d 871, 878 ¶13 (Rev. Board 1979) (search warrant is not required for an inspection of a CB radio station). See also *NAL*, 26 FCC Rcd at 3700 & n.12.

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission's Rules, Ira Jones **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willfully and repeatedly violating Section 303(n) of the Communications Act of 1934, as amended, and Section 95.426(a) of the Commission's rules.²²

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Forfeiture Order.²³ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁴ Ira Jones shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made.

14. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/ NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

15. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

²² 47 U.S.C. §§ 303(n), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 95.426(a).

²³ 47 C.F.R. § 1.80.

²⁴ 47 U.S.C. § 504(a).

²⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁶ See 47 C.F.R. § 1.1914.

16. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Ira Jones at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

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LIBRARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	
)	
Jerry Russell d/b/a The Russell Company)	
)	
and)	
)	
Hanszen Broadcasting)	
	)	Facility I.D. No. 71519
For Assignment of License for Station	)	File No. BAL-20080617ACD
)	
KWRD(AM), Henderson, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 2012**Released: July 27, 2012**

By the Chief, Audio Division

I. INTRODUCTION

1. The Media Bureau has before it the captioned application (the "Application") seeking Commission consent to the assignment of the license for Station KWRD(AM), Henderson, Texas (the "Station") from Jerry Russell d/b/a The Russell Company ("Russell" or the "Licensee") to Hanszen Broadcasting ("Hanszen"). Also before us are Petitions to Deny the Application filed on July 17, 2008, by Larry G. Fuss ("Fuss") (the "Fuss Petition") and on August 12, 2008, by counsel for Phillip Burr ("Burr") (the "Burr Petition"),¹ related responsive pleadings,² and Russell's January 29, 2009, and February 22, 2011, responses to two staff inquiry letters as described below.³

2. In this *Memorandum Opinion and Order*, for the reasons set forth below, we treat the Fuss and Burr pleadings as informal objections, deny those objections, and grant the Application with conditions.

¹ Additionally, on July 21, 2008, Burr also filed on his own behalf a letter accusing Russell of defrauding him in connection with the sale of the Station. Attached was a copy of the "Plaintiff's Original Petition" regarding this claim which Burr instituted in the District Court for the 4th Judicial District of Rusk County, Texas, Case No. 2008-156.

² Hanszen filed oppositions to the Fuss Petition and the Burr Petition on July 30, 2008, and August 1, 2008, respectively. Russell also filed an opposition to the Fuss Petition on August 7, 2008. Burr also filed a "Consolidated Reply to Oppositions to Petition to Deny" ("Burr Reply") on August 12, 2008. Additionally, on January 20, 2011, and again on March 11, 2011, counsel for Hanszen wrote the Commission claiming that Hanszen would make an "exemplary licensee" committed to improving station performance and urging the Commission to grant the Application without further delay. Finally, on August 2, 2011, counsel for Hanszen filed a "Motion for Prompt Relief."

³ On March 11, 2009, Fuss filed comments on Russell's January 20, 2009, response.

II. BACKGROUND

3. Russell and Hanszen filed the Application on June 17, 2008, proposing to assign the license and sell the assets of the Station to Hanszen for a total purchase price of \$100,000.⁴ In the Application, Russell responded to the question in Section II, Item 4, regarding his other broadcast interests by checking the box “N/A” but including an Exhibit 5 stating, “Assignor believes it is the licensee of KOFY-AM, [Gilmer, Texas].”⁵

4. *Fuss Petition.* In his Petition, Fuss alleges that the Application failed to disclose Russell’s ownership of numerous other broadcast stations.⁶ This, he claims, “exhibits an act of deception” that the Commission should investigate.⁷ Additionally, Fuss asserts that all of Russell’s and MRSVI’s radio stations have been silent for more than one year without Commission authority. Fuss also alleges that: (1) Russell, Community and MRSVI have all failed to pay forfeitures assessed by the Commission against stations licensed to them for a variety of rule violations, including violations of the Emergency Alert System, tower enclosure, and public inspection file rules;⁸ (2) Russell, Community, and MRSVI each failed to file biennial ownership reports required by Section 73.3615 of the Rules;⁹ (3) Russell, Community and MRSVI have failed to pay their annual regulatory fees as required by Section 9 of the Act¹⁰ and Section 1.1151 of the Rules;¹¹ and (4) Russell, Community and MRSVI all engage in “shoddy” radio station business practices, such as disregarding contractual and other legal obligations.¹²

5. In its opposition, Hanszen contends that, even if true, the Fuss Petition’s allegations are irrelevant and that the revocation of the Station’s license would not serve the public interest. Hanszen argues that Fuss lacks standing to file a petition to deny because he lives in Las Vegas, Nevada, and is simply a creditor of Russell.¹³ With regard to Russell’s alleged failure to report other broadcast interests in the Application, Hanszen contends that Russell was under no obligation to do so because the stations not reported had been silent for over a year and, therefore, pursuant to Section 312(g) of the Act,¹⁴ their licenses had terminated by operation of law. Additionally, Hanszen asserts that: (1) Section 1.80(f)(5) of

⁴ Hanszen also agrees to assume certain Station’s liabilities. Among these was the \$7,200 balance on a *Forfeiture Order* issued to Russell by the Enforcement Bureau, Acct No. 200732500002 as discussed below. See *Jerry Russell dba The Russell Company*, Forfeiture Order, 22 FCC Rcd 48 (South Central Region, EB, 2007), *recon. dismissed*, Memorandum Opinion and Order, 22 FCC Rcd 9065 (EB 2007) (the “2007 Forfeiture”). The 2007 Forfeiture was imposed for willful and repeated violation of 47 C.F.R. § 11.35(a) of the Rules due to Russell’s failure to ensure the operational readiness of the Station’s Emergency Alert System. Hanszen loaned to Russell \$25,000 out of the deposited purchase price to satisfy this and other obligations. See Application, Asset Purchase Agreement, Paragraphs 2.3.9 and 3.2 and Security Agreement. The Commission’s Office of Managing Director has confirmed that the 2007 Forfeiture has been paid.

⁵ Application Section II, Item 4 and Exhibit 5.

⁶ Fuss argues that Russell did not disclose his ownership of KZEY(AM), Tyler, Texas, owned by Community Broadcast Group, Inc. (“Community”) of which Russell is the President and 92 percent shareholder. He also alleges that Russell failed to disclose that he is President and 100 percent stockholder of M.R.S. Ventures, Inc. (“MRSVI”), the licensee of a number of radio stations in Arkansas and Mississippi.

⁷ Fuss Petition at 3.

⁸ *Id.* at 4 and Exhibit 7. See 47 C.F.R. §§ 11.35(a), 73.49, and 73.3526, respectively.

⁹ *Id.* at 5. See 47 U.S.C. § 73.3615.

¹⁰ 47 U.S.C. § 159.

¹¹ 47 C.F.R. § 1.1151.

¹² Fuss Petition at 8.

¹³ Hanszen cites *Arizona Mobile Telephone Co.*, Memorandum Opinion and Order, 80 FCC 2d 87 (Rev. Bd. 1980).

¹⁴ 47 U.S.C. § 312(g).

the Rules directly refers unpaid forfeitures to the Department of Justice for collection, and that matter does not concern the Commission here; (2) ownership reports did not have to be filed for other Russell-controlled entities because these stations had been silent for more than a year and the station licenses had expired pursuant to Section 312(g); (3) all delinquent regulatory fees appear to have been paid; and (4) the “shoddy business practices” alleged in the Fuss Petition “extend beyond FCC rule compliance [and] are not within the realm of FCC jurisdiction.” Hanszen concludes that there is nothing that the Commission could or should do to rectify any of them.¹⁵ In his Opposition to the Fuss Petition, Russell simply states that he “agrees with all key points” made by Hanszen in its Opposition and, additionally, asserts that one of the lawsuits referenced in the Fuss Petition has been dismissed.

6. *Burr Petition.* In his Petition Burr asserts that, in 2006, Burr entered into a Time Brokerage Agreement (“TBA”) with Russell to provide programming for the Station. He states that the TBA included an option to purchase the Station with payments under the TBA credited toward the purchase price. According to Burr, Russell gave notice that it was terminating the agreement due to defaults by Burr and entered into an agreement with Hanszen for the sale of the Station in April of 2008. Burr indicates that he has brought suit in the 4th Judicial District of Rusk County, Texas, with regard to Russell’s alleged breach of contract and has sought to enjoin Russell from selling the Station. He asks that the Commission hold this matter in abeyance pending a final court ruling. Burr also claims that Russell’s actions demonstrate that he does not have the character qualifications to remain a Commission licensee or to assign the Station license.

7. In its Opposition to the Burr Petition, Hanszen argues that Burr has failed to show that he has standing to file a Petition to Deny. Rather, it contends, he has only demonstrated that he has a lawsuit pending in a Texas court regarding a private contractual matter. Additionally, Hanszen notes that the Petition makes no allegation that it (Hanszen) is unqualified to be licensee of the Station and raises only issues that are irrelevant to the Commission’s concern here.

8. *Russell Inquiry Letter Responses.* The record lacked any substantive representation from Russell regarding his attributable broadcast ownership interests and the operational status of stations in which he may have had such an interest. Accordingly, on January 7, 2009, Media Bureau sent two separate letters of inquiry to Russell requesting additional information.¹⁶ Russell responded to the *Other Interests Letter*¹⁷ on January 29, 2009, indicating that Station KOFY(AM), Gilmer, Texas, “was deleted” but that he obtained a Special Temporary Authority (“STA”) from the Commission which gave him six months in which to make the station operational. He claims he is doing that and that KOFY(AM) “should be completely operational within the period specified in the STA.”¹⁸ With regard to MRSVI, Russell

¹⁵ Hanszen Opposition at 5.

¹⁶ See *Letter to Mr. Jerry Russell* (Jan. 7, 2009) (the “*Other Interests Letter*”); *Letter to Mr. Jerry Russell* (Jan. 7, 2009) (the “*Operational Status Inquiry Letter*”).

¹⁷ The *Operational Status Inquiry Letter* was returned to the Commission as “unclaimed” by the Post Office on March 10, 2009.

¹⁸ See BLSTA-20051025ACS, granted on September 23, 2008, gave Russell the authority to operate KOFY(AM) pending consideration of the station’s renewal application. The STA expired on March 23, 2009. Russell filed an untimely request for extension of that STA on June 24, 2009. See File No. 20090624AEZ. In fact, Russell had filed a timely license renewal application for that station, but neglected to pay the requisite filing fee. The staff subsequently accepted the application and assessed Russell a late-fee penalty. *Letter to Ms. Gwendolyn Walker, M.R.S. Ventures, Inc.* reference 1800B3-KAW (MB rel. Nov. 19, 2010). However, the staff was unable to grant the application due to a “red light” hold for failure to pay regulatory fees.

Additionally, the staff was unaware that, as implied by the response, Station KOFY(AM) had ceased operations. It therefore sent Russell an operational status inquiry about that station on October 27, 2011. *Letter to Jerry Russell*, Reference 1800B3-DW (MB Oct. 27, 2011). Mr. Russell responded on November 22, 2011, indicating that: (1) KOFY(AM) ceased operations in May of 2007 but returned to the air with full power on August 1, 2009; and (2) the station operated from August 1, 2009, until November 15, 2011, when Mr. Russell took the station silent once again.

contends that, as a result of financial hardship, he is selling the stations and he expects to have a “definitive agreement” in the near future. He argues that he did not list the MRSVI or Community stations in the instant application because the Community station was not broadcasting and the MRSVI stations were about to be relinquished to his senior lender. Thus, he contends, the omission of these attributable interests was an “honest mistake.”¹⁹

9. Commission staff forwarded a copy of the *Russell Response* to Fuss and to counsel for Burr on February 17, 2009, providing 10 days for those parties to respond. Burr did not respond, but Fuss submitted a letter, received March 11, 2009, indicating that the *Russell Response* “continues the same pattern of deception that Mr. Russell has engaged in in the past.”²⁰ He observes that, although Russell claims to have agreed to assign the MSRVI stations to his senior lender, no assignment applications have been filed. He also states that he contacted Christopher L. Murray of purported buyer, Interstate Broadcasting Company, LLC (“IBC”) and was told that IBC had “walked away” from the potential acquisition when it discovered that the stations were all off the air and most of the assets are gone.”²¹

10. Because Russell did not respond to the inquiry letter regarding the operational status of his stations, the staff resent that letter on January 21, 2011.²² In his subsequent response, Russell acknowledges that all of the other stations in which he had an attributable interest had gone silent in 2006 and 2007 and their licenses had therefore expired pursuant to Section 312(g) of the Act.²³ He indicates that he believed he had properly notified the Commission of the stations’ status and further that he believed that, due to the expiration of the stations’ licenses, he had no further reporting obligations.²⁴

11. In light of Russell’s response, on May 2, 2011, the staff declared expired the licenses and cancelled the licenses for the following stations: KZEY(AM), Tyler, Texas (Facility ID No. 12809); Station KPBQ-FM, Pine Bluff, Arkansas (Facility ID No. 52619); Station KZYP(FM), Pine Bluff, Arkansas (Facility ID No. 33726); KOTN(AM) Pine Bluff, Arkansas (Facility ID No. 4236); KCLA(AM), Pine Bluff, Arkansas (Facility ID No. 33725); KRKD(FM), Demott, Arkansas (Facility ID No. 86857); KZYQ(FM), Lake Village, Arkansas (Facility ID No. 16551); WRKG(FM), Drew, Mississippi (Facility ID No. 16552); WDTL-FM, Cleveland, Mississippi (Facility ID No. 16557); WZYQ(FM), Mound Bayou, Mississippi (Facility ID No. 43900); and WDSK(AM), Cleveland, Mississippi (Facility ID No. 16554).²⁵

Letter to Mr. Peter H. Doyle from Jerry Russell (rec’d Dec. 6, 2011). On February 29, 2012, the Bureau issued a letter announcing that the KOFY(AM) license had expired by operation of law pursuant to 47 U.S.C. § 312(g) and dismissing a pending license renewal application (File No. BR-20050408ABH) and STA extension request for that station. *Letter to Jerry Russell*, reference 1800B3-DW (MB Feb. 29, 2012). That action has not been appealed and has become final.

¹⁹ January 29, 2009, Russell response at 2.

²⁰ *Letter to Mr. Peter Doyle, Chief, Audio Division, Media Bureau from Larry G. Fuss* (rec’d Mar. 11, 2009) (“*Fuss Letter*.”)

²¹ *Fuss Letter* at 1-2. Fuss provides no extrinsic evidence to corroborate his hearsay discussion with IBC’s Murray. Fuss also notes that the Dr. Topham Letter indicates that Russell “is able to carry out full daily activities without difficulty” and “remains stable and fully active.” *Fuss Letter* at 2.

²² *Letter to Mr. Jerry Russell*, reference 1800B3-MFW (Jan. 21, 2011).

²³ *Letter to Peter H. Doyle, Chief, Audio Division, Media Bureau* (rec’d Feb. 22, 2011). Mr. Russell indicates that he had suffered serious health problems over the last several years and had been unable to monitor the stations’ activity and operations.

²⁴ *Id.* at 1.

²⁵ *Public Notice* of these Actions was released on May 5, 2011. See *Broadcast Actions*, Public Notice, Report No. 47480 (May 5, 2011), pp. 10-12. These actions are now final.

III. DISCUSSION

12. *Procedural Matter: Standing.* A party filing a petition to deny must demonstrate standing to do so by providing “specific allegations of fact sufficient to show that [it] is a party in interest.”²⁶ These allegations must show that 1) the petitioner would suffer a direct injury that is more than hypothetical or purely speculative;²⁷ 2) the injury is causally linked to the challenged action;²⁸ and 3) the relief sought will likely be remedied with the Commission’s denial of the pending application.²⁹ Moreover, “it is well established that ‘standing is accorded to persons not for the protection of their private interests but only to vindicate the public interest.’”³⁰ Accordingly, creditors are not generally permitted to intervene as a matter of right solely on the ground that they have a financial stake in the survival of the parties.³¹ Finally, in order to file a petition to deny, the petitioner must provide an affidavit or declaration that establishes such standing.³²

13. Neither Fuss nor Burr has adequately demonstrated standing to file a Petition to Deny. Although Fuss provided an affidavit, he has failed to show how the injury that he claims he will suffer is causally linked to the challenged action or that denial of the Application would provide the relief he seeks. The harm Fuss claims he will suffer stems from a judgment he has against MRSVI and does not pertain to the Station or Licensee here. We agree with Hanszen that Fuss’s status as a Russell creditor is insufficient, of itself, to confer standing.³³ Burr did not provide an affidavit or declaration establishing his standing to file a Petition to Deny and alleges only that Burr and Russell are opposing litigants in a lawsuit. Therefore, he has not established that he has standing to file a Petition to Deny. We will, however, treat both the Fuss Petition and the Burr Petition as informal objections under Section 73.3587 of the Rules.³⁴

14. *Substantive Matters. Russell’s Other Broadcast Interests.* Russell responded to the question in the Application regarding his other broadcast interests by checking the box “N/A” and included an Exhibit 5 which stated “Assignor believes it is the licensee of KOFY-AM.” As he later admitted, Russell at the time held attributable interests in MRSVI and Community. However, Hanszen and Russell claim that Russell was under no obligation to report these interests because the stations licensed to these entities had been silent for more than 12 consecutive months and, accordingly, the

²⁶ 47 U.S.C. § 309(d)(1).

²⁷ See, e.g., *In re Conn-2 RSA Partnership*, Memorandum Opinion and Order, 9 FCC Rcd 3295, 3297 (1994) (injury cannot be hypothetical, but rather fairly traceable to whether the Commission decides to grant the license). See also *K Licensee, Inc.*, Letter, 23 FCC Rcd 7824, 7825 (2008).

²⁸ See *In re PCS 2000, L.P.*, Memorandum Opinion and Order, 12 FCC Rcd 1681, 1685-86 (1997) (petitioner did not meet the requirements of standing because although it provided sufficient facts to show and injury, it did not adequately explain how denying the pending license would remedy its injury). See also *Riverside Youth & Rehabilitation d/b/a Riverside Ministries*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 10360, 10362-63 (2008).

²⁹ *Id.*

³⁰ *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 335, 359 F. 2d 994, 1001 (1966).

³¹ See *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 46 FCC 2d 350 (Rev. Bd. 1974).

³² *K Licensee, Inc.*, 23 FCC Rcd at 7825.

³³ See *CBS Radio Stations, Inc.*, 22 FCC Rcd 22058, 22061 (MB 2007), citing *Arizona Mobile Telephone Company*, Memorandum Opinion and Order, 80 FCC 2d 87 (1980); *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d at 1001; and *Hertz Broadcasting of Birmingham, Inc.*, 46 FCC at 352 (financial interests of major creditor of applicant do not constitute adequate basis to qualify petitioner as a “person aggrieved”).

³⁴ 47 C.F.R. § 73.3587.

station licenses had terminated pursuant to Section 312(g) of the Act. Although the staff had not been informed of the stations' silence and the staff had not taken the ministerial step of cancelling these licenses at the time the Application was filed, a license expires automatically when a station fails to transmit broadcast signals for a continuous twelve-month period.

15. Moreover, the record of this application proceeding is somewhat muddled by Russell's shifting explanations for not disclosing these interests. As noted, he initially agreed with Hanszen's contention that he did not need to disclose these interests because the station licenses had expired pursuant to Section 312(g) of the Act. Later, in response to the *Other Interests Letter*, Russell stated that he did not list the MRSVI or Community stations in the Application because the Community station was not broadcasting and the MRSVI stations were about to be relinquished to his senior lender. Still later, in response to the resent *Operational Status Inquiry Letter*, Russell reverted back to the license expiration theory. He indicated that all other stations in which he had an attributable interest had gone silent in 2006 and 2007 and their licenses had therefore expired pursuant to Section 312(g) of the Act and therefore that, due to the expiration of the stations' licenses, no further reporting obligation was required.

16. The Commission and the courts have recognized that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."³⁵ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.³⁶ Moreover, Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."³⁷ Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if it is provided without a reasonable basis for believing that the statement is correct and not misleading.³⁸

17. Russell's failure to list any attributable broadcast interests apart from KOFY(AM), on the unique facts here, do not constitute either a misrepresentation, lack of candor, or a false certification. We find that, on June 17, 2009, when Russell filed the application listing only KOFY(AM), the licenses of all of his other broadcast stations -- including KOFY(AM) -- had expired by operation of law under Section 312(g). Accordingly, Russell was not required to report any ownership interest in those former stations. Thus, Russell's failure to do so, although clearly made without a reasonable factual basis because Russell at that time simply did not know whether his stations were on the air or the length of time any had been off the air, constituted a "true certification," not a false certification.

18. However, Russell's failure to provide timely notification and seek authority remain silent with respect to these other stations constitute serious, potentially actionable, offenses. Section 73.1740(a)(4) requires a licensee to notify the Commission when causes beyond the licensee's control make it impossible to adhere to the station's minimum operating schedule, and requires a licensee to seek

³⁵ See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) ("CRS Order") citing, e.g., *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) ("*Contemporary Media*"); and *Cumulus Licensing, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13711, 13717 (MB 2007) ("[I]t is essential that licensees make full and clear disclosure of all material facts in every application. . .").

³⁶ *Contemporary Media*, 214 F.3d at 196.

³⁷ 47 C.F.R. § 1.17(a)(2).

³⁸ See *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4106, 4017 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004) (stating that the revision to Section 1.17 is intended to "prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive").

authorization for any period of limited or discontinued authorizations exceeding 30 days. It enables the Commission to remain informed about the operational status of a station and permits the Commission to monitor the service that station is providing to its community. This, in turn, enables the Commission to ensure that licensees broadcast in the public interest, a responsibility imposed by the Communications Act of 1934, as amended.³⁹ Russell's failure to notify the Commission that his each of his 12 separate stations was off the air evidences some combination of gross incompetence and wanton disregard of his disclosure obligations under Section 73.1740(a)(4) of the Rules. Although his conduct falls far short of minimum licensee conduct we decline to find a lack of candor for several reasons. Most importantly, Russell, himself raised the Section 312(g) issue, thereby undermining the argument that his incomplete answer was motivated by a desire to hide the operational status of these silent stations. In addition, if, *arguendo*, those licenses had not expired, Russell's disclosure of his interests would not have been an impediment to the grant of the Application. Nevertheless, we find Russell's conduct to be sufficiently egregious as to raise concerns about his ability and commitment to comply with Commission rules and policies regarding licensee disclosure requirements. Accordingly, Russell may not acquire an attributable interest in a Commission licensee without prior notice to the Commission and a full showing that he will fully meet all Commission obligations.

19. As a result, we find that Russell violated Section 73.1740(a) of the Rules by failing to seek special temporary authorization to remain silent for any of those 12 stations. The failure to do so would warrant a notice of apparent liability for forfeiture for each instance of unauthorized silence.⁴⁰ Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules, the base forfeiture amount for unauthorized discontinuance of service is \$5,000.⁴¹ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁴²

20. However, Section 503(b)(6)(B) of the Act prohibits the Commission from imposing a forfeiture penalty against a person that does not hold a broadcast license "if the violation occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability."⁴³ Because Russell is no longer the licensee of these 12 stations, we are statutorily barred from issuing a forfeiture for his apparent misconduct at those stations.

21. Additional Allegations. None of the remaining Fuss or Burr allegations warrant further inquiry. To the extent that Fuss raises allegations concerning stations other than KWRD(AM), the Commission has long held that misconduct at one station is not necessarily imputed to a licensee's other stations.⁴⁴ Nothing in the record warrants departure from that policy here.

³⁹ Renewal Reporting Requirements for Full Power, Commercial AM, FM and TV Broadcast Stations, Notice of Proposed Rulemaking, 8 FCC Rcd 49, 49 ¶ 5(1993).

⁴⁰ See, e.g., *South Seas Broadcasting, Inc.*, Forfeiture Order, 55 Communications Reg. (P&F) 997 (MB 2012) (affirming two \$5,000 forfeitures for two separate instances of unauthorized silence, one lasting for more than one month and the other more than two months).

⁴¹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17113-15; 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

⁴² 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

⁴³ 47 U.S.C. § 503(b)(6)(B).

⁴⁴ See *Character Policy Statement*, 102 FCC 2d at 1223-25 (no presumption that misconduct at one station is necessarily predictive of the licensee's operation of other stations). See also *Citicasters Licenses, L.P.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19234, 19336 (MB 2007) (allegations of misconduct by licensee at stations other than those at issue not relevant for consideration).

22. With regard to Fuss' allegations concerning Russell's, Community's and MRSVI's asserted unpaid forfeitures, only the 2007 Forfeiture relates to the Station.⁴⁵ However, this forfeiture has been paid. Similarly, Fuss has alleged that Russell, Community and MRSVI have been delinquent in the payment of regulatory fees. Because the instant application only involves Russell, we will not consider herein the allegation with respect to Community and MRSVI. Sections 9(c)(1)-(3) of the Act⁴⁶ provide that the penalties for late payment of regulatory fees can consist of a financial penalty, dismissal of applications or other filings, or license revocation. It appears, however, that the Station's regulatory fees were paid on September 18, 2008, and there is not currently a "red light" hold on KWRD(AM).

23. Finally, with respect to Fuss' allegation concerning how Russell, Community and MRSVI have engaged in "shoddy business practices" resulting in breaches of contracts, lawsuits, judgments, seizures of property, and evictions, Fuss has provided no evidence that these alleged business practices either violated the Act or the Rules or have resulted in a criminal conviction. Thus, none of those matters fit within the categories of Commission or non-Commission misconduct that the Commission has said would be relevant to determining an applicant's character qualifications.⁴⁷

24. Burr's allegations fail for the same reason. As Burr has acknowledged, the Commission has consistently held that parties should seek redress for private contractual disputes in courts of competent jurisdiction.⁴⁸ Burr has not provided evidence of an injunction or a stay issued by any court against the proposed sale. In the absence of such a court order, the Commission has routinely acted favorably on license assignment applications pending resolution of private disputes such as those at issue here.⁴⁹ We note, however, that Commission grant of an assignment application merely finds that the parties are qualified under, and the proposed transaction does not violate, the Act, the Rules or Commission policies. As such, it is permissive only and does not prejudice any relief to which the parties may ultimately be entitled.⁵⁰

25. *The Application.* We have evaluated the Application and find that the proposed transaction complies with all pertinent statutory and regulatory provisions and that a grant of the subject Application would serve the public interest, convenience, and necessity. Accordingly, pursuant to Section 310 of the Act,⁵¹ we will grant the application to assign the license of the Station from Russell to Hanszen as conditioned below.

IV. ORDERING CLAUSES

26. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petitions to Deny filed by Larry G. Fuss on July 17, 2008, and by Phillip Burr on August 12, 2008, treated herein as Informal Objections, ARE DENIED.

⁴⁵ See *Jerry Russell dba The Russell Company*, referenced in note 4 *supra*.

⁴⁶ 47 U.S.C. §§ 159(c)(1)-(3).

⁴⁷ The Commission-related misconduct alleged by Fuss pertains to other licensee entities in which Russell has an interest. Fuss merely repeats allegations made in previous complaints. In any event, Fuss has not shown that these matters are germane to the instant matter.

⁴⁸ See *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

⁴⁹ See *H. Edward Dillon*, Memorandum Opinion and Order, 94 FCC 2d 203 (1973) (Commission will not delay action on an involuntary assignment application where state appellate court refused to grant stay of receiver's appointment and specifically authorized the receiver to close the sale).

⁵⁰ See *Letter to Geraldine R. Miller and George R. Borsari, Jr., Esq.*, 24 FCC Rcd 11814, 11815 (MB 2009).

⁵¹ 47 U.S.C. § 310.

27. IT IS FURTHER ORDERED that, pursuant to Section 310 of the Communications Act of 1934, as amended, the application for Commission consent to the assignment of the license of Station KWRD(AM), Henderson, Texas, from Jerry Russell d/b/a The Russell Company and Hanszen Broadcasting for Station KWRD(AM) (File No. BAL-20080617ACD) IS GRANTED, subject to the conditions that: (1) Jerry Russell shall not in the future acquire an attributable interest in any Commission licensee or permittee without advance notice and a full showing that he will fully discharge all Commission obligations relating to such license or permit; (2) should Jerry Russell propose to hold an attributable interest in any applicant for a Commission authorization, he must submit this showing and a copy of this *Memorandum Opinion and Order* with the application.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau



PUBLIC NOTICE

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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WIRELINE COMPETITION BUREAU SEEKS COMMENT ON PROPOSED URBAN RATES SURVEY AND ISSUES RELATING TO REASONABLE COMPARABILITY BENCHMARKS AND THE LOCAL RATE FLOOR

WC Docket No. 10-90

Comments: [30 days after publication in the Federal Register]

1. In this Public Notice, the Wireline Competition Bureau seeks comment on a proposed survey of urban rates for fixed voice and fixed broadband residential services. The Bureau also seeks comment concerning how, using data from the urban rates survey, to determine the local voice rate floor and the reasonable comparability benchmarks for fixed voice and fixed broadband services.

2. Background. On November 18, 2011, the Commission released the *USF/ICC Transformation Order and FNPRM*, which comprehensively reforms and modernizes the universal service and intercarrier compensation systems.¹ In the *Order*, among other things, the Commission directed the Wireline Competition Bureau and Wireless Telecommunications Bureau to conduct a survey of residential urban rates for fixed voice, fixed broadband, mobile voice, and mobile broadband services.² In the *Further Notice*, the Commission sought comment on various issues associated with determining reasonable comparability for voice and broadband rates.³

3. The rate survey, conducted once each year, will be used to establish a rate floor that carriers receiving high-cost loop support (HCLS) or high-cost model support must meet in order to receive their full support amounts, beginning in 2014.⁴ In addition, the rate survey will be used to develop reasonable comparability benchmarks for voice and broadband rates that carriers will annually certify their rates do not exceed, with the first certification due July 1, 2013.

¹ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order or Order*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); *Connect America Fund*, WC Docket No. 10-90 *et al.*, Order on Reconsideration, 26 FCC Rcd 17633 (2011); *Connect America Fund*, WC Docket No. 10-90 *et al.*, Second Order on Reconsideration, FCC 12-47 (rel. Apr. 25, 2012) (*Second Reconsideration Order*); *Connect America Fund*, WC Docket No. 10-90 *et al.*, Third Order on Reconsideration, FCC 12-52 (rel. May 14, 2012) (*Third Reconsideration Order*).

² *USF/ICC Transformation Order*, 22 FCC Rcd at 17694, para. 85, 17708, para. 114. We do not address the mobile voice and broadband components of the survey at this time.

³ *Id.* at 18046-47, paras. 1018-27.

⁴ *Id.* at 17751, para. 239, 17855, para. 592. The rate floor is set at \$10 for the year beginning July 1, 2012, and \$14 for the year beginning July 1, 2013. Supported carriers are required to report their local rates that are below the relevant benchmark beginning July 1, 2012. These reports will be used to determine whether support reductions are required for carriers with artificially low rates.

4. Content of Rate Survey. Appendix A to this Public Notice contains the survey instrument that the Bureau proposes to gather data regarding fixed voice and fixed broadband rates. We seek comment on the details of the proposed rate survey as described below.

5. In the fixed voice section of the survey, the Bureau proposes that providers will separately report non-discounted rates and other charges (i.e. taxes, fees, etc.) for their unlimited or flat-rate local service, unlimited all-distance service, and measured or messaged local service. If the provider does not offer such service, it will indicate as such and not report data for that item. Providers will report rates for both public switched telephone network (PSTN) and Voice over Internet Protocol (VoIP) service, to the extent each is offered. Various non-recurring charges will also be surveyed. We seek comment on the proposed data to be collected in the fixed voice section of the survey.

6. In the fixed broadband section of the survey, the Bureau proposes that providers will separately report non-discounted rates and other charges for four specific advertised speed tiers of broadband service.⁵ Are the four proposed speed tiers a reasonable set on which to collect rates? For each offering, the provider will also report on any capacity limits and what action is taken if the capacity limit is reached. Such actions may include overage charges, blocking traffic, and rate limiting.⁶ Are there any other service provider practices regarding capacity limits that should be included? Do the survey's questions about capacity limits adequately capture market offerings given the current market for residential, fixed broadband? Is the proposed format appropriate for collecting information on usage-based broadband pricing for fixed services, and, if not, how should the format be modified?

7. The Bureau intends to implement this survey through an online reporting form accessible to those urban providers of fixed voice and broadband services who are selected to participate. Urban providers will be chosen to create a statistically valid sample for the purpose of setting a reasonable comparability benchmark for fixed voice and fixed broadband services and a rate floor for fixed voice service. Independent samples will be chosen for the fixed voice and fixed broadband sections of the survey. The proposed survey will use as a population from which to sample all terrestrial providers of residential voice or broadband services in urban areas. The Bureau proposes defining "urban" for the purposes of this survey as all 2010 Census urban areas and urban clusters that sit within a Metropolitan Statistical Area (MSA). We seek comment on this approach.

8. For each section (fixed voice and fixed broadband), urban providers will be chosen in order to generate a statistically valid sample for the purpose of calculating benchmarks and rate floors. Responding providers will be asked for rates in a specified geographic area. We propose specifying, for each surveyed provider, a 2010 Census tract (that is "urban," as explained above) for which rates should be reported. For sampling purposes, the Bureau will use in-house data to determine which providers are serving a Census tract. To aid providers in locating the specified Census tract when completing the survey, the survey will include hyperlinks where the respondent can look up the Census tract on a map. Will this approach allow respondents to easily and accurately report rates?

9. In the interest of simplicity, the proposed survey will not collect rates for bundles of applications (i.e., voice and broadband bundle; voice, broadband, and TV bundle, etc.). The survey will also only collect

⁵ The proposed survey asks for broadband rates for service within the following advertised speed ranges (download range)/(upload range): Tier 1 (≥ 4 Mbps and < 6 Mbps)/(≥ 1 Mbps and < 1.5 Mbps); Tier 2 (≥ 6 Mbps and < 10 Mbps)/(≥ 1.5 Mbps and < 2 Mbps); Tier 3 (≥ 10 Mbps and < 25 Mbps)/(≥ 2 Mbps and < 3 Mbps); Tier 4 (≥ 25 Mbps)/(≥ 3 Mbps).

⁶ Rate limiting is an action taken by an Internet service provider that restricts the rate at which a user can send or receive data over the provider's network.

non-discounted rates that are available to potential customers rather than actual rates paid by existing customers. For the survey's intended purposes, obtaining information about bundles, discounts and promotional pricing of limited duration would unnecessarily increase the complexity and burden of the data collection on service providers that are selected to respond to the survey. We seek comment on this approach.

10. To the extent commenters contend that we should modify the content of the proposed survey, they should specify with particularity how the proposed survey should be altered and explain why their preferred approach better serves to accomplish the Commission's objectives. Should any of the survey's questions or terminology be altered for clarity or accuracy? Should we modify proposed sampling and collection process in any way? Are there any other changes that should be made?

11. Use of Data for Urban Rate Floor. The Bureau also seeks comment on how the information collected in the proposed urban rates survey should be used to establish the local rate floor. Historically, the Bureau surveyed local rates (both flat-rate and measured local service) and developed a single urban local rate average.⁷ For purposes of the rate floor, we propose to use the urban flat local rate data to derive a population-weighted national urban average that will be used as the local rate floor in 2014 and updated annually thereafter. We seek comment on this proposal.

12. Use of Data for Reasonable Comparability of Voice Service. In the *USF/ICC Transformation Order*, the Commission required that carriers certify that their voice rates are within two standard deviations of "the national average" for voice service.⁸ We request comment on how rate survey data should be used to determine this national average.

13. For fixed voice service, the Bureau seeks comment on deriving the national average for rate comparability purposes solely from data collected regarding local, flat rate voice service in urban areas. Alternatively, should we instead develop the national average based solely on urban data for unlimited, all-Distance service, as determined from the survey? A reason to adopt a national average based on the urban unlimited, all-distance rates rather than the local, flat rate is that the unlimited, all-distance service best reflects the varied ways - in terms of call frequency, duration, and distance - that households typically communicate using voice services. We seek comment on these two alternatives and the implications of each in terms of the ability of carriers to meet the certification requirement. Under either approach, we propose to develop a population-weighted average. We seek comment on this approach. How, if at all, should we take into account non-recurring charges when computing the fixed voice benchmark?

14. The Bureau proposes to establish a single benchmark for fixed voice service by which supported carriers would certify their rates, for purposes of reasonable comparability, regardless of the voice service offered (i.e. flat, local; unlimited, all-distance; measured local). One reason for doing so is that the urban availability of some services may diminish over time and reduce the available sample population for a given service. This in turn could increase the year-to-year variability in the benchmarks, while also creating, as a statistical artifact, wide deviations in the benchmarks for different types of voice services.

15. Another alternative would be to develop a separate national average for each voice service surveyed (i.e. flat, local; unlimited, all distance; measured, local). To the extent commenters believe the Bureau should establish multiple, service-specific reasonable comparability benchmarks for voice rather than simply developing a single average for urban voice service, they should explain why such an approach is

⁷ IATD, Wir. Comp. Bur., Universal Service Monitoring Report, Table 7.6, Average Residential Rates for Local Service in Urban Areas, 1986-2007 (Dec. 2008).

⁸ *Id.* at 17694, para. 85.

preferable and consistent with the framework established by the Commission in the *USF/ICC Transformation Order*. The Bureau also proposes not combining multiple service rates collected in the survey into a single benchmark because this would require weighting each service's rate by its number of subscribers. Collecting such subscriber information would unnecessarily impose more burden on the carriers surveyed. To the extent commenters contend that the Bureau should combine multiple services' rates into a single benchmark, how should the rates be combined and what measures could be taken to minimize burden on those providers that are surveyed?

16. The *Further Notice* sought comment on whether to adopt a presumption that if a given provider is offering the same rates, terms and conditions (including capacity limits) to both urban and rural customers, that is sufficient to meet the statutory requirement that services be reasonably comparable.⁹ Under such a presumption, providers that serve both rural and urban markets would not be required to certify their voice rates against a national urban benchmark derived from the proposed rate survey. We seek further focused comment on this potential approach. In particular, commenters are encouraged to identify the universe of providers that would be able to utilize the presumption, under the proposed survey approach that would define urban areas as MSAs.

17. Calculation of Voice Rates for Certifying Carriers Offering Measured Service. We also seek comment on how a fixed voice provider offering only measured service will determine its rate that should be compared to the national urban average for voice service, for purposes of rate comparability. The Bureau proposes allowing such carriers to calculate a "blended" rate which will be compared to the national urban rate voice average, consistent with the approach adopted by the Commission for purposes of the local rate floor.¹⁰ In particular, we propose that a supported carrier with measured service should use its average minutes of use data during each rate period (e.g. peak, off-peak) to calculate its rate for reasonable comparability purposes. We seek comment on this approach.

18. Use of Data for Reasonable Comparability of Fixed Broadband Service. To the extent there were a presumption that offering the same service in both rural and urban areas meets the reasonable comparability requirements of the statute, there would be no need for some providers to compare their broadband rates to a national average urban rate benchmark derived from the results of the proposed rate survey. For fixed broadband, the Bureau proposes using the surveyed rate data for each speed tier to set reasonable comparability benchmarks for those providers that are required to certify against a national urban benchmark. Each speed tier would have its own benchmark, and providers would certify their rates against the speed tier corresponding to the slowest broadband service they offer. We are proposing to establish different benchmarks for different speed tiers so that supported providers offering substantially faster broadband service than the minimum required under the Commission's public interest obligations can certify their rates against a more comparable urban service, rather than an urban benchmark for a much slower service or an average of rates for both slower and faster services. We seek comment on this approach. Would such an approach be a workable way to determine reasonable comparability for providers that do not offer broadband services in urban areas?

19. Alternatively, should the several speed tiers be combined to form a single benchmark? How, if at all, should we take into account non-recurring charges when computing the fixed broadband benchmark?

⁹ *Further Notice* at 18047, para. 1027.

¹⁰ In the *Third Reconsideration Order*, the Commission clarified that for purposes of the rate floor, the local service rate reported by carriers that provide measured or message rate plans should reflect the basic rate for local service plus the additional charges incurred for measured service, using the mean number of minutes or message units for all customers subscribing to that rate plan multiplied by the applicable rate per minute or message unit. *Connect America Fund*, WC Docket No. 10-90 *et al.*, Third Order on Reconsideration, 27 FCC Rcd 5622, 5630, para. 22 (2012).

How, if at all, should the capacity limit data be used for determining reasonable comparability? Given the emergence of usage-based broadband pricing, how should such rates be incorporated into the benchmark? Should the Bureau collect usage data on such plans so a “blended” rate can be calculated? How might a supported broadband provider with a usage-based service certify its rates?

Procedural Matters

20. Filing Requirements. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, interested parties may file comments on or before the dates indicated on the first page of this document.¹¹ Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS).¹²

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

21. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

22. **People with Disabilities:** To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

23. In addition, one copy of each pleading must be sent to each of the following:

- (1) Jay Schwarz, Industry Analysis and Technology Division, Wireline Competition Bureau, 445 12th Street, S.W., 6-A134, Washington, D.C. 20554; e-mail: Jay.Schwarz@fcc.gov.
- (2) Alexander Minard, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., 5-A334, Washington, D.C. 20554; e-mail: Alexander.Minard@fcc.gov.

24. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹³ Persons making *ex parte* presentations must file a copy

¹¹ 47 C.F.R. §§ 1.415, 1.419.

¹² See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113. Report and Order, 13 FCC Rcd 11322 (1998).

¹³ 47 C.F.R. §§ 1.1200 *et seq.*

of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

25. Paperwork Reduction Act. This document contains proposed new information collection requirements. The Bureau, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Bureau seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

26. Initial Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980 (RFA),¹⁴ the Bureau has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the Public Notice. The analysis is found in the Appendix B. The Bureau requests written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the Public Notice and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Report and Order and Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

- FCC -

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¹⁴ See 5 U.S.C. § 603.

APPENDIX A

Proposed Rate Survey Questions for Fixed Services Sections of Rate Survey

Note: The below survey instrument is intended to be implemented via an online interface accessible to survey participants. The particular format used in this appendix is for explanatory purposes only.

I. SURVEY RESPONDENT INFORMATION

This survey asks questions about PROVIDER NAME's (FIXED VOICE, FIXED BROADBAND, MOBILE) services and rates. Please answer all questions as they pertain to the specific geographic location indicated below on MONTH DAY, YEAR.

Enter identifying information below as it pertain to the location identified in the bottom line of Section I.

I. SURVEY RESPONDENT INFORMATION	
Provider Name:	<i>Pre-populated by FCC</i>
Provider FRN (used on Dec 31, 2011 Form 477):	
Provider Study Area Code (if current USF recipient):	
Name of Person Completing Form:	
Contact Phone Number:	
Contact Email Address:	
Name of Certifying Official:	
Certifying Official's Phone Number:	
Certifying Official's Email Address:	
Location for Which Reported Rates Apply:	<i>Pre-populated by FCC</i>

II. FIXED VOICE

Report rates on fixed voice service provided in GEOGRAPHIC LOCATION. All reported rates should be non-discounted, residential rates available on MONTH DAY, YEAR to any existing or potential customer at the specified location. Report rates for fixed voice service that is *not* bundled with any other product (e.g. Internet, TV).

II. FIXED VOICE INFORMATION			
Indicate which fixed voice plan types are offered and whether the service is available to customers through circuit switched, VoIP or both.			
II.a Does this carrier offer unlimited or flat-rate local voice service?	Yes - circuit switched, VoIP?	No	
II.b Does this carrier offer unlimited or flat-rate, all-distance service?	Yes - circuit switched, VoIP?	No	
II.c Does this carrier offer measured/metered local voice service?	Yes - circuit switched, VoIP?	No	
For each service offered (as indicated "Yes" in II-a, II-b, and II-c), report each component of the rate in dollar and cents amounts. If both PSTN and VoIP service is offered, answer questions separately as prompted for each service. "All-distance" services include only domestic calling, not international.			
(Answered separately, as appropriate, for PSTN and VoIP)			
II.d - Monthly Rates	Unlimited or Flat-Rate Local Service (II-a)	Unlimited All-Distance Service (II-b)	Measured or Messaged Local Service (II-c)
II.d.1 Recurring service charge (without SLC)			
II.d.2 Federal subscriber line charge (SLC), if any			
II.d.3 Access Recovery Charge (ARC), if any			
II.d.4 Federally tariffed local number portability (LNP) surcharge, if any			
II.d.5 Federal universal service surcharge on Fed. SLC, LNP or ARC, if any			
II.d.6 State SLC, if any			
II.d.7 State USF charge, if any			
II.d.8 Mandatory extended area service (EAS) charges, if any			
II.d.9 Other mandatory surcharges (such as gross receipts tax) accounted as company revenue and not included elsewhere			
II.d.10 Tax or surcharge for funding 911 service			

II.d.11 Interstate telecommunications relay service (TRS or relay)			
II.d.12 State TRS			
II.d.13 Total other taxes (such as sales, excise, etc.) levied on customers by state, county, local governments.			
II.d.14 Federal excise tax on local service		NA	
II.d.15 Number of voice calls or message units included in monthly rate if measured service (local service area calls only)	NA	NA	
II.d.16 Dollar calling allowance for voice calls included in monthly rate if measured service (local service area calls only).	NA	NA	
11.d.17 Peak period local rate per unit (minute or call/message) once allowance exceed, if measured service.	NA	NA	Indicate if rate is per call or per minute
11.d.18 Off-peak period local rate per unit (minute or call/message) once allowance exceeded, if measured service.	NA	NA	Indicate if rate is per call or per minute
II.e - Service Initiation Charges			
II.e.1 Total connection charge for residential service if no premises visit is required.			
II.e.2 Minimum additional charge if drop line and terminal block are needed to connect service. Do not include any inside wiring charges.			
II.e.3 Mandatory surcharges on connection accounted as company revenue			
II.e.4 State, county, and local taxes and surcharges on connection			
II.e.5 Other mandatory connection charges			

III. FIXED BROADBAND

Report rates on fixed broadband service provided in GEOGRAPHIC LOCATION. All reported rates should be standard, non-discounted, residential rates available on MONTH DAY, YEAR to any existing or potential customer. Report rates for fixed broadband service that is not bundled with any other product (e.g. telephone, TV). Exclude residential broadband service that is provided via satellite.

III. BROADBAND INTERNET SERVICE INFORMATION		
III.a Does this provider offer a standalone broadband Internet service with advertised data transfer speeds in the following ranges? Note that the service must meet both the download and upload speed criteria.		
III.a.1 SERVICE RANGE 1: Download: at or above 4 Mbps and less than 6 Mbps; Upload: at or above 1 Mbps and less than 1.5 Mbps	Yes	No
III.a.2 SERVICE RANGE 2: Download: at or above 6 Mbps and less than 10 Mbps; Upload: at or above 1.5 Mbps and less than 2 Mbps	Yes	No
III.a.3 SERVICE RANGE 3: Download: at or above 10 Mbps and less than 25 Mbps; Upload: at or above 2 Mbps and less than 3 Mbps	Yes	No
III.a.4 SERVICE RANGE 4: Download: at or above 25 Mbps; Upload: at or above 3 Mbps	Yes	No
III.b If the provider offers at least one standalone service in the specified range, report in Mbps the advertised download and upload speeds of the slowest service meeting the criteria of the service range. Also, report each capacity limit (in GB) applied to the service, if any. If multiple capacity limits are available for the same service speed, list each separately. If only one capacity limit is offered, only report this limit. A capacity limit is the level at which the ISP begins to block, rate-limit, or charge excess fees for additional data transmission. If no limit is applied, enter "Unlimited." For each capacity limit in place, indicate what action is taken when the limit is reached. If a capacity limit is based on a customer's use relative to other customers, report the data amount for which the limit would be reached as of MONTH DAY, 2012. <i>Note: For services with capacity limits, a drop down box will offer a menu of actions the ISP will take once the limit is reached. These include: "Overage Charge," "Blocking Traffic", "Rate-limiting," and "Other (explain)."</i>		
SERVICE RANGE 1		
Advertised Speed (Mbps)	Capacity Limit(s) (GB)	Action Taken When Limit Reached
Download _____ Upload _____	1 _____	1 _____
	2 _____	2 _____
	3 _____	3 _____
SERVICE RANGE 2		
Advertised Speed (Mbps)	Capacity Limit(s) (GB)	Action Taken When Limit Reached

				Reached	
Download	Upload	1		1	
		2		2	
		3		3	
SERVICE RANGE 3					
Advertised Speed (Mbps)		Capacity Limit(s) (GB)		Action Taken When Limit Reached	
Download	Upload	1		1	
		2		2	
		3		3	
SERVICE RANGE 4					
Advertised Speed (Mbps)		Capacity Limit(s) (GB)		Action Taken When Limit Reached	
Download	Upload	1		1	
		2		2	
		3		3	
<p>For each service offered (as indicated "Yes" in III.a.1 to III.a.4), report each component of the rate in dollar and cents amounts. Reported monthly rates should be standard, non-discounted residential rates. In some cases, this may be the month-to-month rate available to a customer not eligible for introductory rates, etc.</p>					
		SERVICE RANGE			
III.c - Recurring Access Rates		1	2	3	4
III.c.1 Recurring monthly charge					
III.c.2 Total of state, local, and municipal taxes					
III.c.3 Total of all other mandatory fees and taxes (such as provider surcharges, etc.) passed through.					
III.c.4 Surcharges on the service accounted as company revenue (i.e. non-pass through)					
<p>For each item listed, report the minimum amount a customer would pay for each non-recurring charge in the event the item was required for the customer to access the Internet via the broadband service. If an item is not offered by the provider, then mark it as "NA".</p>					
		SERVICE RANGE			
III.d - Non-Recurring Charges (Minimums)		1	2	3	4
III.d.1 Activation or Connection <i>not</i> requiring a service visit to the premises					
III.d.2 Activation or connection requiring a service visit (but assuming the premises is already physically wired)					
III.d.3 Does this service require the customer use a modem or other hardware?		Yes/No	Yes/No	Yes/No	Yes/No

III.d.4 If "Yes" for III.h.3, what is the purchase price for necessary hardware? (If provider sells such hardware.)				
III.d.5 If "Yes" for III.h.3, what is the <u>monthly rental price</u> for necessary hardware? (If provider rents hardware.)				
III.d.6 Computer/laptop hook-up by service technician already making a service visit.				

APPENDIX B

Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),

¹ the Bureau has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Public Notice. The Commission will send a copy of the Public Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Public Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

The Public Notice seeks comment on a proposed survey of urban rates for fixed voice and fixed broadband residential services. The Bureau also seeks comment concerning how, using data from the urban rates survey, to determine the local voice rate floor and the reasonable comparability benchmarks for fixed voice and fixed broadband services. The rate survey, and benchmarks and rate floors based on the survey, is part of implementing the *USF/ICC Transformation Order* to insure supported provider's rates are not unreasonably high or unnecessarily low.⁴

B. Legal Basis

The legal basis for any action that may be taken pursuant to the Notice is contained in sections 1, 2, 4(i), 214, 254, 303(r), 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 214, 254, 303(r), 403, and 706, and sections 1.1 and 1.1421 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.421.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶ In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.⁷ A small-business concern" is one which: (1) is

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ See Notice at para. 2.

⁵ See 5 U.S.C. § 603(b)(3).

⁶ See 5 U.S.C. § 601(6).

⁷ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸

Small Businesses. Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.⁹

Wired Telecommunications Carriers. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.¹⁰ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.¹¹ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.¹² Thus, under this size standard, the majority of firms can be considered small.

Local Exchange Carriers (LECs). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁴ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁵ Consequently, the Commission estimates that most providers of local exchange service are small entities, that may be affected by the rules and policies proposed in the Public Notice.

Incumbent Local Exchange Carriers (incumbent LECs). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁶ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁷ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁸ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Public Notice.

We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”¹⁹ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are

⁸ See 15 U.S.C. § 632.

⁹ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://www.sba.gov/advo/stats/sbfaq.pdf> (accessed Dec. 2010).

¹⁰ 13 C.F.R. § 121.201, NAICS code 517110.

¹¹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

¹² See *id.*

¹³ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

¹⁵ See *id.*

¹⁶ See 13 C.F.R. § 121.201, NAICS code 517110.

¹⁷ See *Trends in Telephone Service* at Table 5.3.

¹⁸ See *id.*

¹⁹ 5 U.S.C. § 601(3).

not dominant in their field of operation because any such dominance is not “national” in scope.²⁰ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²¹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.²² Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.²³ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.²⁴ In addition, 72 carriers have reported that they are Other Local Service Providers.²⁵ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.²⁶ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Public Notice.

Wireless Telecommunications Carriers (except Satellite). Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.²⁷ Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.²⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.²⁹ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.³⁰ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.³¹ Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.³² Of these, an estimated 261 have 1,500 or

²⁰ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²¹ See 13 C.F.R. § 121.201, NAICS code 517110.

²² See *Trends in Telephone Service* at Table 5.3.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See 13 C.F.R. § 121.201, NAICS code 517210.

²⁸ U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”: <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”: <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²⁹ 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

³⁰ U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

³¹ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

³² See *Trends in Telephone Service* at Table 5.3.

fewer employees and 152 have more than 1,500 employees.³³ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.³⁴ The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁵ An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁶ The SBA has approved these small business size standards in the context of LMDS auctions.³⁷ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

Cable and Other Program Distribution. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”³⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.³⁹ According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.⁴⁰ Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.⁴¹ Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Public Notice.

Cable Companies and Systems. The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.⁴² Industry data indicate that, of 1,076 cable

³³ See *id.*

³⁴ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) (“*LMDS Second Report and Order*”).

³⁵ See *LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

³⁶ See *id.*

³⁷ See *Alvarez to Phythyon Letter 1998*.

³⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁹ See 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

⁴¹ See *id.*

⁴² See 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

operators nationwide, all but eleven are small under this size standard.⁴³ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁴⁴ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁴⁵ Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Public Notice.

Cable System Operators. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁴⁶ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁴⁸ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁴⁹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

Open Video Services. The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁰ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵¹ OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."⁵² The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.⁵³ Of this total, 939 firms had employment of 999 or fewer

⁴³ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁴ See 47 C.F.R. § 76.901(c).

⁴⁵ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁴⁶ 47 U.S.C. § 543(m)(2); see also 47 C.F.R. § 76.901(f) & nn.1-3.

⁴⁷ 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

⁴⁸ These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules.

⁵⁰ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

⁵¹ See 47 U.S.C. § 573.

⁵² U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁵³ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5. Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

employees, and 16 firms had employment of 1000 employees or more.⁵⁴ Thus, under this second size standard, most OVS operators are small and may be affected by rules adopted pursuant to the Public Notice. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁵ Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁶ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

Internet Service Providers. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."⁵⁷ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.⁵⁸ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.⁵⁹ Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.⁶⁰ Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.⁶¹ Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000 employees or more.⁶² Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Public Notice.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

In this Public Notice, the Commission seeks public comment on a proposed survey of urban rates for fixed voice and fixed broadband residential services. The Bureau also seeks comment concerning how, using data from the urban rates survey, to determine the local voice rate floor and the reasonable comparability benchmarks for fixed voice and fixed broadband services. The Public Notice seeks comment on data requirements that would require reporting by small entities. Specifically, the Public Notice seeks comment on the collection of advertised rates and product offerings from small entities in urban areas that are included in the sample.

⁵⁴ See *id.*

⁵⁵ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsceer.html>.

⁵⁶ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁵⁷ U.S. Census Bureau. 2007 NAICS Definitions. "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁵⁸ 13 C.F.R. § 121.201. NAICS code 517110.

⁵⁹ U.S. Census Bureau. 2007 Economic Census, Subject Series: Information. Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

⁶⁰ See *id.*

⁶¹ U.S. Census Bureau. 2007 Economic Census, Subject Series: Information. Table 5. Employment Size of Firms for the United States: 2007, NAICS code 5171103 (issued Nov. 2010).

⁶² See *id.*

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁶³

The Public Notice seeks comment on issues related to the rates survey and how the benchmarks and rate floors should be determined. The rate survey issues are not anticipated to have a significant economic impact on small entities because the survey will only sample a small number of providers. Furthermore, since the statistical sampling methodology will result in larger entities being more likely to be surveyed, we anticipate small entities will only compose a minor portion of the overall sample. Moreover, the survey only asks about advertised rates and product offerings which should be readily available to entities of any size. Furthermore, any significant economic impact cannot necessarily be minimized through alternatives since the survey sample will already be restricted to a small set of the total population of carriers necessary for generating a statistically valid sample, and the survey will only ask for readily available advertised rates and will be implemented in an easily accessible online format.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

⁶³ 5 U.S.C. § 603(c)(1)–(c)(4).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Mississippi State University	)	WT Docket No. 02-55
)	
and	)	Mediation No. TAM-32234
)	
Nextel Communications, Inc.)	

ORDER REOPENING THE RECORD

Adopted: July 26, 2012

Released: July 26, 2012

By the Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. Before us is a case referred to us for *de novo* review from Wave 3 Stage 2 mediation by the 800 MHz Transition Administrator, LLC (TA).¹ This case involves a dispute between Mississippi State University (Licensee or MSU) and Nextel Communications, Inc. (Sprint)² (collectively the Parties) concerning the appropriate method of rebanding MSU's system.

2. In this *Order Reopening the Record*, we address, *inter alia*, Sprint's proposal to reduce the deviation of the Licensee's 3-Site Scan radios from 5 kHz to 4 kHz to enable the radios to comply with the Commission's technical rules for the NPSPAC band (the "radio realignment solution").³ Based on our *de novo* review of the mediation record, the Recommended Resolution submitted by the TA-appointed mediator (TA Mediator or Mediator), and the Parties' position statements,⁴ we direct the TA Mediator to reopen the record to adduce additional evidence on the feasibility of the radio realignment solution.

II. BACKGROUND

3. The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee that is subject to rebanding.⁵ The FRA must provide for retuning of the licensee's system to its replacement channel assignments at Sprint's expense, including

¹ Recommended Resolution, TAM-32234 (filed June 11, 2012) (RR).

² For purposes of uniformity in *de novo* review decisions, we refer to Nextel Communications, Inc. herein as its parent, Sprint Nextel Corp. (Sprint).

³ Proposed Resolution Memorandum of Nextel Communications, Inc., dated May 3, 2012, at 12, Appendix A-7 (Sprint PRM).

⁴ Statement of Position of Nextel Communications, Inc., dated June 25, 2012 (Sprint SOP); Statement of Position of Mississippi State University, dated June 25, 2012 (MSU SOP).

⁵ Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969, 15075-77 ¶ 201 (2004) (*800 MHz Report and Order*); Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*); Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005).

the expense of retuning or replacing the licensee's radio units as required.⁶ Sprint must provide the rebanding licensee with "comparable facilities"⁷ on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.⁸

4. In the instant case, the Parties dispute the method of rebanding MSU's system that will best meet the Commission's comparable facilities standard. The dispute revolves around how adequately to provide functionality equivalent to MSU's existing 3-Site Scan system post-rebanding. Three-Site-Scan "allows the user to create a subscriber based 'multisite roaming' system without transmitter sites [. . .] being networked together."⁹ Although Harris Corporation (Harris), the manufacturer of MSU's radios, has long stopped manufacturing 3-Site Scan legacy radios,¹⁰ MSU insists that it retain 3-Site Scan functionality post-rebanding, or, at least, functionality that "closely mimic[s]" 3-Site Scan.¹¹ To maintain 3-Site Scan functionality, the Parties have advanced three alternative rebanding methodologies.

5. First, Sprint proposes that the Licensee move to the Interleaved band and retain its current system (the "interleaved solution").¹² This proposal requires Sprint to replace MSU's existing NPSPAC capable radios with comparable models capable of operating on the new NPSPAC channels. It also requires users of MSU's 3-Site Scan radios to equip themselves with two radios, one for the 3-Site Scan system, the other for communicating with NPSPAC interoperability partners.

6. Second, MSU proposes deploying an Integrated Multisite Controller (IMC) switch to mimic 3-Site Scan functionality (the "IMC solution"), but which Sprint claims represents an impermissible upgrade.¹³

7. Third, Sprint proposes to reduce the deviation on MSU's 3-Site Scan enabled radios from 5 kHz to 4 kHz allowing them to operate on both the "new" NPSPAC and Interleaved channels, and provide replacement radios for MSU's remaining subscriber inventory (the "radio realignment solution").¹⁴ MSU and Harris claim that the Commission's rules would require a new equipment certification including a demonstration of compliance with the Commission's emission mask, frequency

⁶ 800 MHz Report and Order, 19 FCC Red at 14977 ¶ 11.

⁷ "Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs." *Id.* at 15077 ¶ 201 (footnotes omitted).

⁸ *Id.* at 14986 ¶ 26.

⁹ Proposed Resolution Memorandum of Mississippi State University, dated May 10, 2012, at 2 (MSU PRM). MSU estimates that fifty percent of its radio inventory is capable of 3-Site Scan and that roughly 200 radios are enabled to use 3-Site Scan functionality at any one time. These radios include four different models: MDX and MDR mobile radios and PCS and 300P portable radios. See MSU PRM at 5.

¹⁰ See MSU PRM at Exhibit 3, Letter from Steve Smith, Project Manager, Harris Corp., to Ralph Nobles, P.E., MSU (dated May 10, 2012) (Harris Letter) ("Harris no longer manufactures or sells any of the EDACS 3-Site Scan legacy radios used by [MSU].").

¹¹ MSU PRM at 17.

¹² RR at 5.

¹³ RR at 5-6. Sprint claims that, an "IMC solution facilitates true roaming functionality as well as wide-area call processing that does not exist today on MSU's system." Sprint PRM at 34.

¹⁴ RR at 7.

stability and other technical rules.¹⁵

8. Sprint disagrees. To support its claim that radio realignment will not require recertification of the Licensee's radios, Sprint argues that the radio realignment proposal will not alter "the design, circuitry or construction of the radios" and merely requires "a software adjustment [. . .] within the scope of its already existing certification."¹⁶ Supporting its assertion, Sprint cites to a 1988 Commission *Memorandum Opinion and Order on Reconsideration* that "specifically authorized the grandfathering of existing end user radio equipment if the deviation were reduced to allow operation on the NPSPAC band."¹⁷ Sprint also relies on a more recent statement by the Public Safety and Homeland Security Bureau (Bureau) approving a rebanding methodology that involved reducing the deviation on four analog FM voice channels. There, the Bureau noted that "[t]he Commission's rules do not directly limit the deviation of 800 MHz land mobile transmitters, but do specify an 'emission mask' to which the transmitter output waveform must conform."¹⁸ At most, Sprint submits that adjusting the radio deviation represents a permissive change under the Commission's certification rules.¹⁹

9. MSU, however, claims that retuning the radios to operate in the new NPSPAC frequency band (806-809 MHz and 851-854 MHz) and adjusting the deviation "are outside the bounds of the existing type acceptance / certification grants for these radios."²⁰ At a minimum, outside counsel to Harris suggests that radio realignment represents a Class II permissive change, requiring testing to "[demonstrate] compliance with the [Commission's] emission mask requirements (Section 90.210 of its rules) and with its frequency stability requirements (Section 90.213 of its rules) [. . .]."²¹ Harris's outside counsel cautions that the Licensee's legacy radios may not demonstrate compliance with current Commission requirements regarding, for example, RF exposure limits.²² Moreover, without providing specific details, Harris estimates that either recertification or the testing required under the permissive change rules requires "multiple months and costs in the six-figure range."²³

10. The TA Mediator recommends that the Commission find that the radio realignment solution provides the Licensee with comparable facilities.²⁴ The TA Mediator deems reasonable Sprint's assertion that recertification is unnecessary because the realignment "would not result in 'a change in the design, circuitry or construction' of the radios [. . .]."²⁵ However, the TA Mediator left final determination of the issue of recertification to the Commission, making the following

¹⁵ MSU PRM at 37; Harris Letter at 2.

¹⁶ Sprint PRM at 6-7.

¹⁷ Sprint SOP at 7, emphasis in original, citing Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821–824/866–869 MHz Bands by the Public Safety Services, *Memorandum Opinion and Order on Reconsideration*, GEN Docket No. 87–112, 3 FCC Rcd 5391, 5397 ¶ 57 (1988).

¹⁸ See County of Genesee, New York and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 12722, 12777 ¶ 15 (PSHSB 2011).

¹⁹ Sprint PRM at 45, n. 49.

²⁰ MSU PRM at 37.

²¹ *Id.* at Exhibit 3 Letter from George Wheeler, Holland Knight to Mr. Steve Smith, Project Manager, Harris Corp. (dated May 9, 2012) at 2.

²² *Id.*

²³ Harris Letter at 1-2.

²⁴ RR at 21.

²⁵ *Id.* at 22.

recommendation:

If the Commission concludes that recertification is not required, the TA Mediator recommends that the Commission direct the Parties to implement the radio realignment solution. However, absent a Commission determination regarding the need for recertification, the TA Mediator recommends that [Sprint] be required to either (1) include in the FRA a warranty that implementation of the radio realignment solution would not require recertification; (2) fund the reasonable costs of recertification; or (3) fund the reasonable costs of implementing the IMC solution.²⁶

The TA Mediator states that “neither Party has submitted adequate support- such as technical specifications and citations to relevant Commission decisions – to enable the TA Mediator to reach a conclusion regarding this matter.”²⁷

11. On June 25, 2012, Sprint filed its Statement of Position (SOP) addressing the TA’s recommendation. Sprint continues to insist that the changes it proposes can be implemented without requiring recertification. Sprint notes that transmitter deviation is not a parameter that the Commission specifically certifies and again cites the Commission order establishing the NPSPAC band in which the Commission grandfathered equipment if the deviation were reduced.²⁸ Nonetheless, Sprint observes that the Commission is best suited to determine whether recertification is required or whether a limited grandfathering or waiver is a preferable approach.²⁹

12. In its SOP, MSU insists that Harris “believes that recertification is necessary.”³⁰ MSU states that “it is unaware of any engineering record filed by Nextel which provides credible support for [the TA’s assumption that Sprint’s proposal appears reasonable]”³¹ MSU asserts that “[i]n the absence of any evidence to contradict the information entered in the record by Harris, the Commission has no credible basis to authorize use of Class I permissive change procedures or to “waive” its equipment modification and/or certification requirements or to permit the realignment to be accomplished without a determination of the NPSPAC interference consequences.”³² MSU notes that “Harris previously explained in the May 9, 2012 letter that the Commission should not waive its equipment certification rules because of the significant adverse interference risks for future harmonized uses of NPSPAC frequencies.”³³ In the event operations of the modified radios cause interference to NPSPAC frequencies, MSU argues, “there is the additional risk that the University’s radio operations would be disrupted or even shut down to discontinue causing such interference.”³⁴ All but a few of these consequences, MSU argues “cannot be adequately addressed after the fact under the terms of a proposed Nextel ‘warranty’ in the FRA.”³⁵

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sprint SOP at 6-7.

²⁹ *Id.*

³⁰ MSU SOP at 3.

³¹ *Id.* at 4.

³² *Id.*

³³ *Id.* at 5.

³⁴ *Id.*

³⁵ *Id.* Additionally, MSU argues that “proceeding without a Commission determination puts the University, as a licensee, at risk of being found to be operating in violation of the Commission’s Rules and the validity of its

(continued....)

III. DECISION

13. Sprint and MSU essentially ask the Bureau to find whether MSU's legacy radios can be adjusted through software-based "alignment procedures" to lower the deviation to meet the Emission Mask requirements, consistent with the radios' existing certification. MSU argues that, at a minimum, a new test report showing compliance with all the current rules, including compliance with RF Exposure limits, is required.

14. The record suggests that Sprint's proposal may be reasonable and that the radios may be rendered rule-compliant through software changes under our Permissive Change Policies. There is, however, insufficient record evidence to reach a final determination on the reasonableness of Sprint's proposal under the comparable facilities standard.

15. As specified in Section 2.907³⁶ of the Commission's rules, certification attaches only to units that are identical to the sample tested and approved, except for permissive changes authorized pursuant to Section 2.1043 of the rules.³⁷ Section 2.1043(b) describes the classes of permissive changes that may be made in certificated equipment without requiring a new application for, and grant of, certification.³⁸ A Class I permissive change includes modifications to the equipment which do not degrade the characteristics reported by the manufacturer and accepted by the Commission,³⁹ whereas a Class II permissive change includes those modifications which degrade the performance characteristics as reported to the Commission at the time of initial certification.⁴⁰ A Class II permissive change requires a filing to the Commission reporting complete information and the results of tests of the characteristics affected by such change.⁴¹

16. The Commission's Permissive Change Policies describe the software modifications that can be made to non-software defined radio (SDR) already-approved devices.⁴² Under those policies, if the frequency band capability of a device is decreased, the change is permitted under a Class I change procedure, provided there are no other changes to the device's parameters.⁴³ Additional frequencies may be added to an approved device subject to certain conditions (*e.g.*, no hardware changes), however, under a Class II permissive change, a new test report must be submitted for the

(...continued from previous page)

licenses for these radios would be jeopardized." *Id.* Further, MSU claims that "this would create regulatory compliance risks for the entity performing the radio realignment, *i.e.* regulatory fines or other penalties for failure to comply with Section 2.1043(a) or (b) of the Commission's Rules (in the case of the original grantee), or with Section 2.929(b) of the Commission's Rules (in the case of any entity other than the original grantee)." *Id.* citing 47 C.F.R. §§ 2.1403(a-b) and 2.929(b).

³⁶ 47 C.F.R. § 2.907.

³⁷ 47 C.F.R. § 2.1403.

³⁸ 47 C.F.R. § 2.1043(b).

³⁹ 47 C.F.R. § 2.1043(b)(1).

⁴⁰ 47 C.F.R. § 2.1043(b)(2).

⁴¹ *Id.*

⁴² Federal Communications Commission, Office of Engineering and Technology, Laboratory Division, Permissive Change Policies dated Jan. 5, 2012 at 5, available at <https://apps.fcc.gov/kdb/GetAttachment.html?id=1vrx5RroKWkZWuqrWrfihg%3D%3D> (last visited July 24, 2012).

⁴³ *Id.*

new frequencies.⁴⁴

17. Based on the record before us, we find that reducing the deviation of an otherwise rule-compliant radio is a software adjustment that does not constitute a change in the physical circuitry of the radio. Therefore, the radio does not require recertification.⁴⁵ MSU's 3-Site Scan radios are certified to operate across the 800 MHz band (806-824 MHz/851-869 MHz). Sprint states that the radios at issue separate the 800 MHz band into three sub-band segments (1) 806-813 MHz, (2) 813-821 MHz, and (3) 821-824 MHz.⁴⁶ Sprint proposes reduction of deviation only in the 806-813 MHz segment, such that all frequencies in this segment are aligned to the same level, *i.e.* 4 kHz.⁴⁷ This segment includes the new NPSPAC band and a portion of the interleaved band.⁴⁸

18. We cannot determine, however, whether the radio realignment solution satisfies the minimum requirements of the technical rules applicable to the NPSPAC band. Under the Permissive Change rules, modified devices "must still meet the minimum requirements of the applicable rules" and "the grantee shall supply the Commission with complete information and the results of tests of the characteristics affected by such change."⁴⁹ Although Sprint suggests that the radio realignment solution could be performed under the permissive change rules using the manufacturer's published procedures, we are not persuaded that just reducing the deviation to 4 kHz would render the radios compliant with the current rules applicable to the NPSPAC band.⁵⁰ That said, however, we are limited to the record in deciding this matter and the record contains nothing that allows us to look behind Sprint's assertions. In particular, there is no record evidence that, if the deviation is reduced to 4 kHz that the radios will comply with the emission mask limits in Section 90.210⁵¹ of the Commission's rules or the frequency stability requirements of Section 90.213⁵² of the rules. Both of these parameters

⁴⁴ *Id.* These conditions include (1) no hardware changes have been made; (2) no increase in the output power rating on new frequencies; (3) the equipment class remains the same; (4) RF exposure changes must be addressed; (5) only the original equipment manufacturer may implement the new frequencies; and (6) there are no other changes to the device that indicate a need for a new FCC ID. *Id.*

⁴⁵ Section 2.1403(a) provides that "changes to the basic frequency determining and stabilizing circuitry (including clock and data rates), frequency multiplication stages, basic modulator circuit or maximum power or field strength ratings shall not be performed without application for and authorization for a new grant of certification."

⁴⁶ Sprint PRM at note 41.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 47 C.F.R. § 2.1403(b)(2).

⁵⁰ "NPSPAC channels operate with a 12.5 KHz separation between channel centers, whereas the rest of the 800 MHz band operates with 25 KHz channel spacing. As a consequence, there is a greater potential for adjacent channel interference between NPSPAC stations unless the stations' emissions in the adjacent channel are attenuated. The emission masks specified in Section 90.210 of the Commission's rules contain the allowable amount of signal in the adjacent channel and beyond. In order to meet the emission mask requirements, the transmitter deviation must be reduced, typically from 5 KHz to 4 KHz." County of Genesee, New York and Sprint Nextel, Corp., WT Docket No. 02-55, *Order on Reconsideration*, 27 FCC Rcd 4158, 4160 n. 15 (PSHSB 2012).

⁵¹ 47 C.F.R. § 90.210.

⁵² 47 C.F.R. § 90.213.

affect the potential of the radios to cause adjacent channel interference.⁵³

19. We also acknowledge Harris's statement that, because the original certification of MSU's legacy radios' predates the Commission's current rules governing RF exposure, the adjusted radios may not comply with current RF Exposure standards.⁵⁴ Accordingly, in order to reach an informed decision about the feasibility of the radio realignment solution and its satisfaction of the comparable facilities standard, we require supplementation of the record with objective evidence that the realigned 3-Site Scan radios will comply with all technical rules applicable to the NPSPAC band, and with current RF Exposure standards.⁵⁵

20. We are therefore remanding this matter to the TA Mediator for the limited purpose of determining whether the radio realignment solution would satisfy the technical requirements applicable to the NPSPAC band and the Commission's RF Exposure standards. The TA Mediator shall reopen the record to collect information on the radio realignment solution in the following fashion: 1) MSU shall select four radios in good working condition corresponding to the four 3-Site Scan radio models and submit those radios to Sprint within five business days of the release date of this *Order Reopening the Record*; 2) Sprint, at its expense, shall submit the sample radios to a Commission-approved laboratory of its choice within five business days of the receipt of the radios from MSU, to assess the effects of reduced deviation; 3) the deviation of each radio shall be reduced to 4 kHz in the band segment 806-813 MHz and then tested to determine compliance with the rules applicable to the NPSPAC band and the Commission's RF Exposure standards; 4) the laboratory shall then submit the test results to the TA Mediator for entry into the record; and 5) within ten business days of receipt of the test report from the laboratory, the TA Mediator shall file a supplementary Recommended Resolution, attaching the laboratory report.

21. Sprint, at its option, may elect not to implement the testing protocol described above. If it so elects, it shall notify the TA Mediator within 5 business days of the release date of this *Order Reopening the Record*, whereupon the record shall be closed and the radio realignment option will be determined not to provide MSU with comparable facilities. The Bureau then will issue an order on *de novo* review consistent with that determination.

IV. CONCLUSION

22. Considering the stage of these proceedings and the record currently before the Bureau, we find that Sprint's realignment proposal likely could be implemented under the Commission's Permissive Change Policies, but that the deficient record precludes us from making factual findings with respect to MSU's interference concerns. Accordingly, an informed decision on this matter dictates that we reopen the record for the limited purpose of assessing MSU's realigned equipment for compliance with the Commission's technical rules for the NPSPAC band and its RF Exposure standards.

V. ORDERING CLAUSES

23. Accordingly, pursuant to the authority of Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission's Rules, 47 C.F.R. § 90.677, IT

⁵³ We recognize Harris's concern that MSU's 3-Site Scan radios may not demonstrate post-rebanding compliance with the applicable rules, including the frequency stability requirements and the stringent NPSPAC emissions mask requirements. See Harris Letter at 2.

⁵⁴ *Id.*

⁵⁵ 47 C.F.R. § 2.1093.

IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed *supra*.

24. IT IS FURTHER ORDERED, that this matter IS REMANDED to the Transition Administrator Mediator to reopen the record consistent with the directions outlined in paragraph 20 *supra*.

25. IT IS FURTHER ORDERED, that, within five business days of the TA Mediator's filing a supplementary Recommended Resolution, the parties may file supplementary Statements of Position with the Bureau. No further pleadings shall be filed unless specifically authorized.

26. This action is taken under delegated authority pursuant to Sections 0.191(f) and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191(f) and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief
Policy and Licensing Division
Public Safety and Homeland Security Bureau



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1201
Released: July 26, 2012

**COMMENTS INVITED ON APPLICATION OF
SIGECOM, LLC D/B/A WOW! INTERNET, CABLE AND PHONE
TO DISCONTINUE DOMESTIC TELECOMMUNICATIONS SERVICES**

WC Docket No. 12-204
Comp. Pol. File No. 1047

Comments Due: August 10, 2012

Section 214 Application

Applicant: Sigecom, LLC d/b/a WOW! Internet, Cable and Phone

On July 2, 2012, Sigecom, LLC d/b/a WOW! Internet, Cable and Phone (Sigecom or Applicant), located at 6045 Wedeking Avenue, Evansville, IN 47715, filed an application with the Federal Communications Commission (FCC or Commission) requesting authority, under section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 63.71 of the Commission's rules, 47 C.F.R. § 63.71, to discontinue certain domestic telecommunications services in the City of Evansville, IN (Service Area).

Sigecom indicates that it currently provides circuit switched local exchange and domestic and international long distance services to residential and commercial customers receiving service in the Service Area via the Nortel Cornerstone platform. Sigecom explains, however, that it has revised its business plan and has decided to discontinue these services because the technology used to provide these services is now obsolete.¹ As indicated in its first application, Sigecom states that it plans to discontinue these services in phases over the next several months.² Sigecom specifies that the discontinuance for this fourth phase is scheduled to occur on or after August 28, 2012, or as soon thereafter as the necessary federal approval can be obtained. Sigecom further clarifies that the planned discontinuance for this fourth

¹ Discontinuance of international service is governed by 47 C.F.R. § 63.19.

² Sigecom filed an application on March 12, 2012 seeking authority to discontinue service to customers that were notified of the first phase of the discontinuance plan scheduled to occur on or after May 8, 2012. *See Comments Invited on Application of Sigecom, LLC d/b/a Wow! Internet, Cable and Phone to Discontinue Domestic Telecommunications Services*, Public Notice, WC Docket No. 12-81, DA 12-554 (rel. April 6, 2012). *See also Comments Invited on Application of Sigecom, LLC d/b/a Wow! Internet, Cable and Phone to Discontinue Domestic Telecommunications Services*, Public Notice, WC Docket No. 12-117, DA 12-825 (rel. May 25, 2012) (regarding the second phase of the discontinuance plan scheduled to occur on or after June 26, 2012); *Comments Invited on Application of Sigecom, LLC d/b/a Wow! Internet, Cable and Phone to Discontinue Domestic Telecommunications Services*, Public Notice, WC Docket No. 12-145, DA 12-922 (rel. June 12, 2012) (regarding the third phase of the discontinuance plan scheduled to occur on or after July 17, 2012). All of these prior applications were automatically granted.

phase is limited to 78 commercial customers and 166 residential customers (Affected Customers) located in Evansville, IN. Sigecom maintains that the planned discontinuance will not adversely affect the public convenience and necessity because customers have been given notice that affords them ample opportunity to either migrate to Sigecom's interconnected VoIP service at substantially the same price as the current services, or to transfer to a new provider. Sigecom asserts that the services that are being discontinued are readily available from other carriers. Sigecom indicates that it mailed written notice of the planned discontinuance to affected residential customers on or about June 26, 2012 and to affected commercial customers on or about June 27, 2012. Sigecom submits that it plans to mail similar letters at least 30 days prior to the planned discontinuance of service to any customers affected by future phases of its overall plan. Sigecom represents that it is non-dominant with respect to the services it proposes to discontinue.

In accordance with section 63.71(c) of the Commission's rules, Sigecom's application will be deemed to be granted automatically on the 31st day after the release date of this public notice, unless the Commission notifies Sigecom that the grant will not be automatically effective. In its application, Sigecom indicates that, during this fourth phase, it plans to discontinue circuit switched local exchange and domestic and international long distance services to the Affected Customers in Evansville, IN on or after August 28, 2012, subject to Commission authorization. Accordingly, pursuant to section 63.71(c), absent further Commission action, Sigecom may terminate circuit switched local exchange and domestic long distance services to the Affected Customers in Evansville, IN on or after **August 28, 2012**. The Commission normally will authorize proposed discontinuances of service unless it is shown that customers or other end users would be unable to receive service or a reasonable substitute from another carrier, or that the public convenience and necessity would be otherwise adversely affected.

Comments objecting to this application must be filed with the Commission on or before **August 10, 2012**. Such comments should refer to **WC Docket No. 12-204 and Comp. Pol. File No. 1047**. Comments should include specific information about the impact of this proposed discontinuance on the commenter, including any inability to acquire reasonable substitute service. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>. Filers should follow the instructions provided on the Web site for submitting comments. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number.

Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. The filing hours are Monday through Friday, 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

Two copies of the comments should also be sent to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 5-C140, Washington, D.C. 20554, Attention: Carmell Weathers. In addition, comments should be served upon the Applicant. Commenters are also requested to fax their comments to the FCC at (202) 418-1413, Attention: Carmell Weathers.

This proceeding is considered a “permit but disclose” proceeding for purposes of the Commission’s *ex parte* rules.³ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

For further information, contact Carmell Weathers, (202) 418-2325 (voice), carmell.weathers@fcc.gov, or Kimberly Jackson, (202) 418-7393 (voice), kimberly.jackson@fcc.gov, of the Competition Policy Division, Wireline Competition Bureau. The tty number is (202) 418-0484. For further information on procedures regarding section 214 please visit http://www.fcc.gov/wcb/cpd/other_adjud.

– FCC –

³ 47 C.F.R. §§ 1.1200 *et seq.*

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Sections 15.35 and 15.253 of the)	
Commission's Rules Regarding Operation of	)	ET Docket No. 11-90
Radar Systems in the 76-77 GHz Band	)	RM-11555
)	
Amendment of Section 15.253 of the)	
Commission's Rules to Permit Fixed Use of Radar	)	ET Docket No. 10-28
in the 76-77 GHz Band)	

ERRATUM

Released: July 27, 2012

By the Chief, Office of Engineering and Technology:

On July 5, 2012, the Commission released a Report and Order, FCC 12-72, in the above captioned proceeding. This Erratum corrects the first paragraph of that document by replacing "15.35" with "15.253" in the second sentence and "15.35(b)" with "15.253" in the third sentence. This Erratum also corrects the second paragraph in Appendix B by replacing "15.253(b)" with "15.253(d)" in the fourth sentence.

FEDERAL COMMUNICATIONS COMMISSION

Julius P. Knapp
Chief, Office of Engineering and Technology



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET S.W.
WASHINGTON D.C. 20554

News media information 202-418-0500
Internet: <http://www.fcc.gov> (or <ftp.fcc.gov>)
TTY (202) 418-2555

DA No. 12-1204

Friday July 27, 2012

Report No. SAT-00886

Policy Branch Information

Actions Taken

The Commission, by its International Bureau, took the following actions pursuant to delegated authority. The effective date of these actions is the release date of this Notice, except where an effective date is specified.

SAT-LOA-20111024-00208 E S2847 Intelsat License LLC

Launch and Operating Authority

Grant of Authority

Effective Date: 07/26/2012

Nature of Service: Fixed Satellite Service

On July 26, 2012, the Satellite Division granted, with conditions, authority to Intelsat License LLC to construct, launch, and operate its proposed C-, Ku-, and Ka-band geostationary orbit space station, Intelsat 20, at the 68.5° E.L. orbital location. Intelsat is authorized to provide Fixed-Satellite Service using the 3700-4200 MHz (space-to-Earth), 5925-6675 MHz (Earth-to-space), 10.95-11.20 GHz (space-to-Earth), 11.45-11.70 GHz (space-to-Earth), 12.50-12.75 GHz (space-to-Earth), 13.75-14.00 GHz (Earth-to-space), 14.0-14.50 GHz (Earth-to-space), 19.70-20.2 GHz (space-to-Earth), and 29.5-30.0 GHz (Earth-to-space) frequency bands. Intelsat is also authorized to perform telemetry, tracking, and command operations necessary to maintain Intelsat 20 at the 68.5° E.L. orbital location using the center frequencies of 12.7465 GHz, 12.747 GHz, 12.748 GHz, or 12.7485 GHz (space-to-Earth) and 13.7505 GHz and 14.498 GHz (Earth-to-space).

SAT-MOD-20120524-00087 E S2134 SES Americom, Inc.

Modification

07/25/2012 - 05/31/2016

Grant of Authority

Effective Date: 07/25/2012

Nature of Service: Direct to Home Fixed Satellite, Fixed Satellite Service

On July 25, 2012, the Satellite Division granted, with conditions, the application of SES Americom, Inc. to modify the authorization for its geostationary orbit space station, AMC-2, to specify operations at the 19.0° E.L. orbital location, rather than at 4.98° E.L.. Accordingly, SES Americom is authorized to operate AMC-2 at 19.0° E.L. to provide Fixed-Satellite Service, including direct-to-home services, in the conventional Ku-band frequencies of 11.7-12.2 GHz (space-to-Earth) and 14.0-14.5 GHz (Earth-to-space). In addition, SES Americom is authorized to conduct telemetry, tracking, and command operations necessary to drift AMC-2 to 19.0° E.L. and to maintain it at that location using center frequencies located at: 3700.5 MHz, 4199.5 MHz, and 12.198 GHz (space-to-Earth), and 6423.5 MHz (Earth-to-space).

SAT-STA-20120629-00108 E S2369 DIRECTV Enterprises, LLC
Special Temporary Authority
Grant of Authority

Effective Date: 07/26/2012

On July 26, 2012, the Satellite Division granted, with conditions, special temporary authority to DIRECTV Enterprises, LLC, for a period of 60 days, to continue to conduct telemetry, tracking, and command operations necessary to maintain the DIRECTV 1R space station at the 109.8° W.L. orbital location. DIRECTV is authorized to use the 17.305 MHz and 17.799 GHz frequencies for command and the 12.69825 and 12.69925 GHz frequencies for telemetry during these operations.

INFORMATIVE

SAT-STA-20120508-00080 S2369 DIRECTV Enterprises, LLC

Application listed in IBFS as granted to reflect operations pursuant to Section 1.62 of the Commission's rules, 47 C.F.R. 1.62. See also IBFS File No. SAT-STA-20120629-00108 (granted July 26, 2012).

For more information concerning this Notice, contact the Satellite Division at 202-418-0719; TTY 202-418-2555.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TOCCOA FALLS COLLEGELicensee of Station WTXR(FM)
Toccoa Falls, Georgia

)
)
)
) Facility ID No. 77327
) NAL/Acct. No. MB201241410025
) FRN: 0006338750
) File No. BRED-20111201FOP

FORFEITURE ORDER

Adopted: July 27, 2012**Released: July 27, 2012**

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Toccoa Falls College ("the Licensee"), licensee of radio station WTXR(FM), Toccoa Falls, Georgia (the "Station"), for its willful and repeated violations of Section 73.3527 of the Commission's Rules ("Rules")¹ by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On May 2, 2012, the Media Bureau ("Bureau") issued a Notice of Apparent Liability for Forfeiture ("NAL"), in the amount of \$10,000 to the Licensee for the apparent violations.² The Licensee filed a Response to Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("Response") on May 31, 2012.

3. On December 1, 2011, the Licensee filed an application to renew the license of the Station. Section III, Item 3 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3527 of the Rules, as applicable, has been placed in the station's public inspection file at the appropriate times. The Licensee indicated "No" to that certification, attaching an exhibit explaining that, when it was preparing to file its renewal application, it discovered that it was missing quarterly issues/programs lists from March 2006, when the station was first licensed, through June 2010. On May 2, 2012, the Bureau issued the NAL notifying the Licensee of its apparent liability for a forfeiture of \$10,000 for willfully and repeatedly violating Section 73.3527 of the Rules, based on its admission that over four years of issues/programs lists were missing from the Station's public inspection file. On May 31, 2012, the Licensee filed its Response.

4. In its Response, the Licensee states that: 1) there is insufficient basis for the finding that

¹ 47 C.F.R. § 73.3527.

² *Toccoa Falls College*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 4905 (MB 2012).

there was a “willful or repeated” violation of the Rule; 2) the forfeiture amount assessed against it is in excess of those imposed on other licensees for violations similar to or more serious in nature than Sun Valley’s violation;³ 3) a reduction in the forfeiture amount is warranted based on its voluntary disclosure of the public file deficiencies; and 4) sanctions imposed on student-run stations should be less than those imposed on other licensees. The Licensee also claims that the staff violated Section 504(c) of the Communications Act of 1934, as amended (the “Act”) because it did not immediately grant renewal upon a preliminary finding in the NAL that the failure to maintain a public file did not merit an evidentiary hearing.⁴

III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,⁵ Section 1.80 of the Rules,⁶ and the Commission’s *Forfeiture Policy Statement*.⁷ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁸

6. We find unpersuasive the Licensee’s argument that the failure to maintain a complete public inspection file for 17 straight quarters at the Station does not constitute a “willful or repeated” violation. The Act defines willful conduct as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law,⁹ and defines repeated conduct as “the commission or omission of such act more than once or, is such commission or omission is continuous, for more than one day.”¹⁰ Although the Licensee cites *Vernon Broadcasting* as an example of a forfeiture that was cancelled for not being willful or repeated,¹¹ that case is clearly distinguishable. There, the licensee was able to document that it regularly inspected its facilities, and that the tower fencing violation resulted from circumstances beyond its control.¹² Here, the Licensee’s deficiencies in maintaining a complete public file cannot similarly be attributed to circumstances outside of its control.

7. We also reject the Licensee’s claim that the Station’s missing issues/program lists only became a violation at the time it reported their absence in its renewal application. We have held that failure to maintain current quarterly issues/programs lists during the term of a license constitutes an

³ The Licensee indicates that as “no member of the public will probably ever review” the public file, this violation is less serious than others that warrant a forfeiture. See Response at 9.

⁴ 47 U.S.C. § 504(c).

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. 1.80.

⁷ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*. Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁸ 47 U.S.C. § 503(b)(2)(E).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ 47 U.S.C. § 312(f)(2).

¹¹ Response at 4. *Vernon Broadcasting, Inc. (WYGO, Corbin, KY)*, Memorandum Opinion and Order, 60 RR 2d 1275, 1277 (1986) (“*Vernon Broadcasting*”).

¹² *Vernon Broadcasting*, 60 RR 2d at 1277. (Evidence supported theory that transmitter fencing was vandalized after regular inspection by licensee and shortly before inspection by FCC).

ongoing, repeated violation.¹³ In failing to ensure, for seventeen straight quarters, that the issues/programs lists were properly filed, the Licensee repeatedly violated Section 73.3527.

8. The harm caused by this failure, inability to provide full information to the public, exists whether or not a member of the public requests to inspect the public inspection file.¹⁴ As we discussed at length in *Faith Christian Music Broadcast Ministries*, issues/programs lists provide both the Commission and the listening public with important information regarding the extent to which a station has met the needs and interests of its community during the prior license term, and therefore, whether license renewal is warranted.¹⁵ A licensee's responsibility to the public is not excused merely because members of the public rarely exercise their right to inspect a station's public files.¹⁶ The rule also is designed to facilitate the airing of programming responsive to community needs.¹⁷ As such, these requirements are integral components of a licensee's obligation to serve the public interest and meet its community service obligations.¹⁸ In the *Forfeiture Policy Statement*, the Commission found that the omission of even a single item (the issues/programs list) from the public inspection file "diminishes the public's ability to determine and comment on whether the station is serving the community."¹⁹ Thus, we find no support for the claim that failure to maintain a public inspection file is any less serious a violation than those assessed smaller forfeitures.

9. The Licensee also argues that we should reduce the forfeiture because the forfeiture amount is inconsistent with that issued to licensees in similar situations. We disagree. It is undisputed that the Licensee's public files were incomplete for over four years, missing all issues/programs lists for 17 consecutive quarters. The \$10,000 base forfeiture issued to the Station is consistent with prior forfeitures for similar violations.²⁰ The past cases referenced in the Response where stations were not assessed the base forfeiture amount can be distinguished, as the amount of information missing from the public inspection file in those cases is much smaller than in the present case.²¹

¹³ See, e.g., *Texas Educational Broadcasting Co-Operative, Inc.*, 26 FCC Rcd 11249, 11249 (MB 2011) (even when files are reconstructed before licensee files application for renewal, failure to maintain complete and current issues/program lists during license term is a continuing violation). See also *Paulino Bernal Evangelism KBRN(AM) Boerne, Texas*, 21 FCC Rcd 9532, 9536 (EB 2006) (public file violations are "by their nature, continuing violations").

¹⁴ *Wilson Broadcasting, Inc.*, Forfeiture Order, 22 FCC Rcd 15963 (EB 2007).

¹⁵ *Faith Christian Music Broadcast Ministries, Inc.*, Forfeiture Order, 20 FCC Rcd 19051, 19053 (MB 2005).

¹⁶ *Id.*

¹⁷ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05, ¶ 39.

¹⁸ See 47 U.S.C. § 307(a).

¹⁹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05.

²⁰ See *Phoenix Broadcasting Group, Inc.*, Forfeiture Order, 23 FCC Rcd 10927 (MB 2008) citing *Faith Baptist Church, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9146 n.14 (MB 2007) (\$10,000 forfeiture issued for eleven missing issues/programs lists); *Geneva Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10642 (MB 2006) (same); *WGSO, L.L.C.*, Forfeiture Order, 2008 WL 4403051, (MB 2008) (\$10,000 forfeiture issued for 10 missing issues/programs lists).

²¹ See, e.g., *Saga Communications of Illinois, LLC*, 26 FCC Rcd 5954 (MB 2011) (several stations assessed a \$3,000 forfeiture where each was missing four or five issues/programs lists). See also *Letter to John Garziglia, Esquire, and John S. Neely, Esquire*, 20 FCC Rcd 12105, 12109 (MB 2005) (licensee admonished for lacking a single item in its public file); *Emmis Television License Corporation*, 19 FCC Rcd 22851, 22851-52 (EB 2004) (licensee admonished for public file missing two letters from the public).

10. We also reject the Licensee's contention that a reduction in the forfeiture is warranted based on its "voluntary disclosure" of the KTXR deficiencies. Although the Licensee admitted to violating Section 73.3527, it did so only in the context of the question contained in its license renewal application that compelled such disclosure.²² We find unpersuasive the argument that the established policy of assessing forfeitures for violations disclosed through the renewal process should be changed because licensees might be tempted to falsify their renewal applications. Rather, we remind the Licensee that the penalties for certifying false statements on a renewal application can include additional forfeitures,²³ revocation of the station's license,²⁴ and even criminal sanctions.²⁵

11. Additionally, we find no support for the claim that student-run noncommercial educational ("NCE") stations should be assessed reduced forfeitures relative to other licensees. We reject the Licensee's argument that its forfeiture should be cancelled or reduced because of its NCE status.²⁶ The Bureau likewise has no precedent for exempting a station from liability by virtue of being student run.²⁷ Rather, licensees are liable for the omissions of those they choose to operate the station.²⁸ Where student-run stations have had forfeitures reduced, we have done so for reasons other than their NCE status or operation by students.²⁹

12. Finally, the staff did not violate Section 504(c) of the Act by not immediately renewing the Licensee's license upon finding that the violations listed in the NAL did not merit an evidentiary hearing. The statute at issue forbids the Commission from using a Notice of Apparent Liability to the prejudice of the party against whom it was issued "in any other proceeding before the Commission[.]"³⁰ However, in the present case the NAL and this Forfeiture Order have been issued as part of the ongoing renewal proceeding, and so withholding grant of the renewal application until the proposed forfeiture is paid or until a *Forfeiture Order* is released is consistent with the statute.³¹

²² Since 2007, we have declined to reduce forfeiture amounts based on a licensee's voluntary disclosure because, although licensees may admit to Section 73.3526 rule violations, they only do so in the context of a question contained in the license renewal application compelling such disclosure. *Faith Baptist Church, Inc.*, 22 FCC Rcd 9146, 9148 (MB 2007); *Geneva Broadcasting, Inc.*, 21 FCC Rcd 10642, 10644 (MB 2006).

²³ See 47 U.S.C. § 503 (forfeitures authorized for willful violations of Commission rules); 47 C.F.R. § 1.17 (rule barring intentionally providing false statements of fact to Commission).

²⁴ 47 U.S.C. § 312.

²⁵ 18 U.S.C. § 1001.

²⁶ *Bible Broadcasting Network, Inc.*, 23 FCC Rcd 8743, 8745 (2008) (forfeiture reduced because station was a translator, not because it was an NCE station). See also *Boulder Community Broadcast Association, Inc.*, Forfeiture Order, 23 FCC Rcd 8308 (EB 2008) (finding that licensee's NCE status alone was an insufficient basis to reduce forfeiture amount); *Lebanon Educational Broadcasting Foundation*, Memorandum Opinion and Order, 21 FCC Rcd 1442, 1446 (EB 2006) (same).

²⁷ *University of Montana Western*, 24 FCC Rcd 3127, 3130-31 (2009) (student-run stations are not exempted from requirements of 47 C.F.R. 73.3527(c)(8)).

²⁸ See *Southern Adventist University*, 26 FCC Rcd 11254, 11256 (2011) (high turnover among staff at student-run NCE station does not excuse licensee's failure to comply with public file requirements).

²⁹ For instance, the Bureau's policy is to impose a lower level of forfeiture amounts on secondary stations such as translators and Class D stations. See, e.g., *Centerville City Schools Board of Education*, 25 FCC Rcd 3855, 3857 (2010) (forfeiture reduced because license was for a Class D secondary service, not because station was operated by students).

³⁰ See 47 USC § 504(c) (emphasis added).

³¹ We will act on the license renewal application shortly after release of this Forfeiture Order.

13. We have considered the Licensee's response to the *NAL* in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that the Licensee willfully and repeatedly violated Section 73.3526 of the Rules. We find that there is no basis for reduction of the proposed monetary forfeiture.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,³² that Toccoa Falls College SHALL FORFEIT to the United States the sum of ten thousand dollars (\$10,000) for willfully and repeatedly violating Section 73.3527 of the Commission's Rules at the Station.

15. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Kelly.Donohue@fcc.gov and Patrick.Thompson@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, Room 1-A625, 445 12th Street, S.W., Washington, DC 20554.³³

16. IT IS FURTHER ORDERED, that copies of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail, to Toccoa Falls College, 292 Old Clarkesville Road, Toccoa, GA 30577, and to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, DC 20016

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³² 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

³³ *Id.*

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
	)	Facility ID No. 83396
Double O South Carolina Corporation	)	NAL/Acct. No. MB-201241410009
	)	FRN: 0011511169
Licensee of Station WWNQ(FM),	)	File No. BRH-20110728AES
Forest Acres, South Carolina)	

FORFEITURE ORDER

Adopted: July 27, 2012

Released: July 27, 2012

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000), to Double O South Carolina Corporation ("Licensee"), licensee of Station WWNQ(FM), Forest Acres, South Carolina ("Station"), for its willful and repeated violation of Section 73.3526 of the Commission's Rules ("Rules")¹ by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On July 28, 2011, Licensee filed the captioned application to renew the license of the Station ("Application"). Section III, Item 3. of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 of the Rules has been placed in the station's public inspection file at the appropriate times. Licensee indicated "No" to that certification, explaining in an Exhibit that the Station's public file was missing quarterly issues/programs lists for the first and third quarters of 2005; the second, third and fourth quarters of 2008; all of 2009; and the first quarter of 2010.² Subsequently, Licensee reconstructed the missing reports and affirmed that they are now located in the Station's public inspection file.

3. On April 10, 2012, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of ten thousand dollars (\$10,000) to Licensee for its violations.³ On May 10, 2012, in response to the NAL, Licensee filed a request for cancellation or reduction of the proposed forfeiture ("Request"). In support of its Request, Licensee argues that: (1) Commission precedent in similar circumstances is to admonish the licensee or issue a reduced penalty; (2) the violations were not willful or repeated; and (3) Commission precedent has treated instances of more serious infractions less severely.

¹ 47 C.F.R. § 73.3526.

² Application, Exhibit 12.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. MB-201241410009 (MB April 10, 2012) ("NAL").

III. DISCUSSION

4. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (the “Act”),⁴ Section 1.80 of the Rules,⁵ and the Commission’s *Forfeiture Policy Statement*, which establish a base forfeiture amount of \$10,000 for violation of Section 73.3526.⁶ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁷

5. Licensee does not dispute that it failed to maintain a complete public file for the Station, but raises several arguments as to why the forfeiture should be cancelled or reduced. First, Licensee argues that the imposition of a \$10,000 forfeiture for the violation is inconsistent with Commission precedent. Licensee cites several Audio Division decisions and one Commission-level case in which licensees received smaller forfeiture amounts.⁸ However, the cited decisions demonstrate a consistent policy of reducing the forfeiture amount from the base \$10,000 penalty for less extensive patterns of violations. Licensee had ten missing issues/programs lists over the years a five year span from 2005 – 2010. The full \$10,000 forfeiture is appropriate and consistent with precedent on comparable patterns of violations.⁹ Licensee also cites several Video Division decisions only admonishing a licensee for issues/programs lists violations.¹⁰ These cases are distinguishable or are consistent with the treatment of a less serious level of violations as described above.

6. We reject Licensee’s additional argument that so long as re-creations of the issues/programs lists are provided at the time of renewal, no forfeiture is warranted. Issues/programs lists “are a significant and representative indication that a licensee is providing substantial service to meet the

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999). (“*Forfeiture Policy Statement*”).

⁷ 47 U.S.C. § 503(b)(2)(E).

⁸ *Opus Broadcasting Tallahassee, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 2012 WL 1454051 (MB 2012) (imposing a \$4,000 forfeiture for seven missing issues/programs lists over a less than two-year span); *Saga Communications of Illinois*, Forfeiture Order, 24 FCC Rcd 2479 (MB 2009) (imposing a \$3,000 forfeiture for four missing lists during one year); *Citadel Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007) (imposing a \$1,000 forfeiture for two missing lists for one year at one station, while separately issuing two additional \$10,000 forfeitures for public inspection file violations at other stations).

⁹ See, e.g., *Urban Radio III, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6376 (MB 2006) (issuing a \$10,000 forfeiture for eight missing issues/programs lists over a three-year span); *Faith Baptist Church*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9146 (MB 2007) (issuing a \$10,000 forfeiture for eleven missing issues/programs lists over a three-year span). See also *WHLG FM, LLC*, Memorandum of Opinion and Order and Notice of Apparent Liability for Forfeiture, 2012 WL 1422948 (MB 2012), cited by Licensee, in which the Bureau imposed the base \$10,000 forfeiture for 22 missing issues/programs lists over a period of more than five-years.

¹⁰ *Louis Martinez Family Group, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 17899 (MB 2008) (admonishing the licensee for providing issues/programs lists that were timely placed in the public file but were lacking required information); *CMCG Portland License LLC*, Letter, 23 FCC Rcd 11955 (MB 2008) (admonishing the licensee for placing issues/programs lists in the public file late); *Tribune Broadcast Holdings*, Letter, 21 FCC Rcd 14070 (MB 2007) (admonishing the licensee for two missing issues/programs lists).

needs and interests of its community.”¹¹ As stated in the NAL, the purpose of maintaining a public file is “to provide the public with timely information about the station at regular intervals.”¹² Further, in the *Forfeiture Policy Statement*, the Commission found that the omission of even a single item (the issues/programs list) from the public inspection file is a serious violation because it “diminishes the public’s ability to determine and comment on whether the station is serving the community.”¹³ Even if the lists were completed and eventually placed in the public file, as Licensee contends, the record is clear that they were unavailable to the public for much of the license term. Therefore, the violation is not mitigated by Licensee’s perception that no harm was committed by the omission of the lists.¹⁴ While we recognize Licensee’s efforts to remedy the errors, corrective action taken to come into compliance with the Rules is expected.¹⁵

7. Licensee next contends that the NAL failed to adequately explain how its violations were willful and repeated and that, regardless, the violations were in fact not willful or repeated. Licensee argues that its violations were not willful because it did not consciously or deliberately omit the lists from the public file. In addition, Licensee claims its violations were not repeated because it acted immediately to re-create the lists upon learning of their omission. However, Licensee’s definitions of willful and repeated are inconsistent with the Commission’s interpretation of those terms.

8. Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁶ Violations resulting from inadvertent error are willful violations.¹⁷ Licensee has failed to justify why a departure from precedent is justified.¹⁸ Thus, Licensee’s failure to properly maintain the Station’s public file constituted a “willful” violation of Section 73.3526 of the Rules, irrespective of its lack of intent.

¹¹ See *Normandy Broadcasting Corp. and Lawrence N. Brandt*, Initial Decision, 8 FCC Rcd 1, 14 (ALJ 1992) (citing *Formulation of Policies and Rules to Broadcast Renewal Applicants*, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6365 (1989)).

¹² NAL at 2.

¹³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05 ¶ 39.

¹⁴ See *Southern Communications Corp.*, Letter, 23 FCC Rcd 1875, 1877 (MB 2008) (“The public file provides citizens with important information about broadcasters’ service to their communities . . . [and] the FCC will not tolerate less than diligent efforts to ensure the accuracy and timeliness of that information”) (citing “FCC Fines 28 Radio Stations for Public File Violations,” News Release, (Oct. 8, 2003)) (“*Southern Communications*”).

¹⁵ See *Pittman Broadcasting, LLC*, Forfeiture Order, 23 FCC Rcd 2742, 2744 (EB 2008). See also *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999) (stating that neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee’s rule violation) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)).

¹⁶ 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. NO. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”).

¹⁷ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992); *Southern California*, 6 FCC Rcd at 4387 (stating that “inadvertence . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”).

¹⁸ Licensee expressed disagreement with the Commission’s approach but did nothing more to support its position. Request at 6 n. 7. Licensee’s statement that “no federal court has ever affirmed the Commission’s approach” (Request at 6) has no bearing here because orders such as this one do not require a court’s approval to take effect. See 47 C.F.R. § 1.102(b).

9. Further, Commission precedent clearly holds that “repeated” means that the act was committed or omitted more than once, or lasts more than one day. Specifically, Section 312(f)(1)¹⁹ of the Act defines “repeated” as “the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day.”²⁰ In this case, Licensee’s violations of Section 73.3526 of the Rules spanned five years. Accordingly, we find that Licensee’s violations were also repeated within the meaning of the Act.²¹

10. Finally, we reject Licensee’s final argument that because other, “more serious” violations are punished with less severe means, monetary forfeiture is inappropriate. Licensee cites a case of a false certification in a license application where the Bureau issued an admonishment rather than forfeiture.²² While the Commission indeed takes false certifications very seriously, Licensee’s subjective determination that the false certification in that case is more serious than its own longstanding public file violation is unpersuasive. As a matter of administrative law, the Commission, and the Bureaus operating pursuant to delegated authority, have discretion over decisions “whether to issue a warning or assess a forfeiture based on the nature and circumstances of the specific violation.”²³ The NAL is consistent with the Commission’s Rules, the *Forfeiture Policy Statement*, and precedent.

11. We have considered Licensee’s Request in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Licensee willfully and repeatedly violated Section 73.3526 of the Rules. Furthermore, we find that Licensee’s arguments do not support cancellation or reduction of the proposed forfeiture amount.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission’s Rules,²⁴ that Double O South Carolina Corporation, SHALL FORFEIT to the United States the sum of \$10,000 for willfully and repeatedly violating Section 73.3526 of the Commission’s Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s Rules within 30 days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁵ Payment of the proposed forfeiture must be made by check or similar

¹⁹ 47 U.S.C. § 312(f)(1).

²⁰ *Id.* See also *Southern California*, 6 FCC Rcd at 4388 (applying this definition of “repeated” to Sections 312 and 503(b) of the Act).

²¹ See, e.g., *Saga Communications of Illinois, Inc.*, Forfeiture Order, 23 FCC Rcd 18041, 18043 (MB 2008) (rejecting argument that the public file violation only occurred “on the day [the licensee] learned the lists were not in the file” and finding that the violation lasting “several years” constituted a repeated violation).

²² *John Jason Bennett*, 20 FCC Rcd 17193 (MB 2005) (finding that the lack of apparent motive and intent to deceive obviated the need for stricter sanctions).

²³ *Forfeiture Policy and Amendment of Section 1.80 of the Commission’s Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17102 (1997) (rejecting proposal to always issue a warning to first-time violators, except in particular cases, because doing so “would greatly undermine the credibility and effectiveness of our overall compliance efforts”). See C.F.R. § 1.80(b)(4). Note (“The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided for in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute”).

²⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

²⁵ 47 U.S.C. § 504(a).

instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).²⁶ Licensee will also send electronic notification on the date said payment is made to Kelly.Donohue@fcc.gov and Eric.Cohen@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, Room 1-A625, 445 12th Street, S.W., Washington, DC 20554.²⁷

14. IT IS FURTHER ORDERED, that a copy of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail, to Double O South Carolina Corporation, 75 Rockefeller Plaza, 23rd Floor, New York, NY 10019, and to its counsel, Mark B. Denbo, Esq., Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁶ See 47 C.F.R. § 1.1914.

²⁷ *Id.*



**Federal Communications Commission
Washington, D.C. 20554**

July 27, 2012

DA 12-1207
In Reply Refer to:
1800B3-ERC
Released: July 27, 2012

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In re: **NCE Reserved Allotment Group No. 8**
New NCE-FM, Westley, California
Sacred Heart Roman Catholic Parish
Facility ID No. 184829
File No. BNPED-20100226AJO

New NCE-FM, Westley, California
Modesto Peace/Life Center
Facility ID No. 184977
File No BNPED-20100224ABX

New NCE-FM, Westley, California
Calvary Chapel of Turlock, Inc.
Facility ID No. 185121
File No BNPED-20100226AGO

Petitions to Deny

Dear Counsel:

We have before us: the referenced applications of Sacred Heart Roman Catholic Parish ("SHRCP"), Modesto Peace/Life Center ("MPLC"), and Calvary Chapel of Turlock, Inc. ("CCT") for a new noncommercial educational ("NCE") FM station on Channel 238A at Westley, California (the "SHRCP Application," "MPLC Application" and "CCT Application," respectively); a Petition to Deny the SHRCP Application, filed by MPLC on June 2, 2011 ("MPLC Petition"); and a Petition to Deny the SHRCP Application, filed by CCT on June 2, 2011 ("CCT Petition").¹ For the reasons set forth below,

¹ SHRCP filed an Opposition to Petition to Deny ("Opposition") on June 27, 2011. MPLC filed a Reply to Opposition to Petition to Deny ("Reply") on July 8, 2011.

we grant the MPLC and CCT Petitions, rescind the prior tentative selection of the SHRCP Application, and dismiss the SHRCP Application. Further, we find the MPLC and CCT Applications defective and dismiss them as well.

Background. SHRCP, MPLC, CCT, and five other parties² filed mutually exclusive applications for a new NCE FM facility on Channel 238A at Westley, California, during the February 2010 NCE filing window. The Commission subsequently designated these applications as NCE Reserved Allotment Group No. 8.³ In the *Comparative Consideration Order*, the Commission concluded that each applicant would provide a first or second NCE service to at least ten percent of the population and to at least 2,000 people within their proposed service areas.⁴ Therefore, all applicants proceeded to an NCE point hearing. SHRCP received three points for being an established local applicant, two points for diversity of ownership, and two points for having the best technical proposal for a total of seven points. MPLC and CCT were credited with five points.⁵ Accordingly, the SHRCP Application was tentatively accepted for filing, triggering a 30-day period for parties to file petitions to deny against the tentative selectee.⁶

In its application, SHRCP asserted that the total population within its 60 dBμ contour is 587,663 people, and that a total of 154,981 people (approximately 26 percent of the total population) within its contour would receive either a first or second NCE service. Accordingly, SHRCP contended that it met the reservation standard.

Both the MPLC and CCT Petitions assert that the SHRCP Application failed to account for NCE FM station KUOP(FM), Stockton, California, in its NCE service calculations and that, when station KUOP(FM) is taken into account, SHRCP's aggregate first and second NCE service would serve only approximately five percent of the total population. MPLC and CCT request that the SHRCP Application be dismissed for failing to satisfy the third channel reservation standard's ten-percent service threshold.⁷

In its Opposition, SHRCP concedes that it overlooked KUOP(FM) and thus does not meet the reservation standard under its original application. However, SHRCP has submitted a curative amendment ("Amendment"), which accounts for the additional NCE station and adjusts its proposed

² The other five applicants were Radio Bilingue, Inc. (File No. BNPED-20100225ACV) ("RBI"), Ondas de Vida Network, Inc. (File No. BNPED-20100226AAE) ("OVN"), Crossroads Church, an Evangelical Free Church (File No. BNPED-20100226ACV) ("Crossroads"), Centro Cristiano Vida Abundante, Inc. (File No. BNPED-20100226ADX) ("CCVA"), and Hispanic Family Christian Network, Inc. (File No. BNPED-20100226AHR) ("HFCN"). These applications were dismissed by the staff on June 7, 2011, and those actions have become final. See *Broadcast Actions*, Public Notice, Report No. 47505 (Jun. 10, 2011).

³ See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7019-20 (MB 2011) ("*Comparative Consideration Order*"). The Westley, CA, Channel 238* allotment was reserved for NCE use in *Amendment of Section 73.202(h), Table of Allotments, FM Broadcast Stations (Westley, California)*, Report and Order, 19 FCC Rcd 13115 (MB 2004).

⁴ *Id.* at 7020. Channel 238A at Westley, California was reserved under the third channel reservation criterion. Accordingly, applicants for this frequency must demonstrate that they are technically precluded from using a reserved channel and that they will provide first or second NCE service to at least ten percent of its covered population, which must total at least 2,000 persons.

⁵ See *id.* Crossroads also was credited with five points. RBI, OVN, CCVA, and HFCN each received two points.

⁶ *Id.* at 7052.

⁷ *Id.* at 7010. The MPLC Petition also argues for dismissal on the grounds that SHRCP failed to obtain reasonable assurance of the construction site's availability, and the CCT Petition claims that the SHRCP's construction site is unsuitable and that SHRCP violated FAA notification requirements, 47 C.F.R. § 17.7(a). Because we dismiss the SHRCP Application on the fair distribution argument, we do not address the merits of these claims.

service population and area.⁸ After the Amendment, SHRCP claims its proposed site provides first or second service to 10.2 percent of its total service population. SHRCP claims because it satisfies the ten percent threshold, the SHRCP Application cannot be dismissed and should be re-evaluated alongside MPLC and CCT.

In its reply, MPLC contends that the Amendment was unauthorized, and, therefore, it cannot be considered.⁹ It states that satisfaction of the third channel reservation standard is a prerequisite to qualifying for the points analysis, and SHRCP cannot amend its Application because it impermissibly enhances its qualifications after the application window closed.

Discussion. SHRCP Application. Section 309(d)(1) of the Act¹⁰ provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.¹¹ First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹² This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.¹³ If no such question is raised and if the Commission concludes that such grant otherwise serves the public interest, convenience, and necessity, the Commission will deny the petition and grant the application.

In upholding the third channel reservation standard, the Commission specifically advised prospective NCE applicants that the first or second NCE service requirement does not end upon allotment but remains applicable at the application stage.¹⁴ An application implementing an allotment reserved under these procedures that fails to satisfy this requirement is eliminated and will not proceed to the point system analysis.¹⁵ Taking station KUOP(FM) coverage into account, we find that SHRCP's original technical proposal provides first and second NCE service to a combined population of 190 people, only 0.03 percent of the total service population of 693,714 people. It thus fails to satisfy the ten-percent threshold requirement of the third channel reservation standard.

⁸ The Amendment changes the antenna coordinates, height, and coverage pattern in order to reduce SHRCP's service population from 587,663 people to 285,962 people and its service area from 3,376 sq. km to 2,309 sq. km. In the Amendment, SHRCP claims to provide first NCE service to 25 people and second NCE service to 29,133 people for a combined 10.2% of the total service population.

⁹ The Reply also contends that the population calculations used in SHRCP's Amendment are flawed because they are based on NED 3-second terrain data instead of the standard 30-second NGDC data. Because we are not considering SHRCP's amendment, we need not address this argument.

¹⁰ 47 U.S.C. § 309(d)(1).

¹¹ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹² See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹³ 47 U.S.C. § 309(d)(2).

¹⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6705 (2003) ("NCE Second Report and Order") ("Reserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service. In the event that all applications for a reserved band allotment fail to propose such service, the allotment will become unreserved by operation of law and subject to the Commission's competitive bidding licensing procedures"). See also 47 C.F.R. § 73.202(a)(1)(ii).

¹⁵ *Comparative Consideration Order*, 26 FCC Rcd at 7009.

SHRCP argues in its Opposition that a tentative selectee is permitted to submit curative amendments if its application is found to be unacceptable;¹⁶ it argues that it is not improving its qualifications because it is reducing its originally proposed service area and population and claiming fewer points than originally awarded, in effect weakening its original comparative position.¹⁷ MPLC argues that the SHRCP Amendment cannot be considered, as the Amendment does have the effect of impermissibly enhancing SHRCP's qualifications after the application window closed because SHRCP should not have proceeded to the point hearing in the first place with its defective proposal.¹⁸

Section 73.7003(e) provides that an applicant's "maximum qualifications are established at the time of application."¹⁹ However, we need not decide whether the Amendment constitutes an untimely attempt to enhance SHRCP's comparative position, because the Amendment, even if acceptable, fails to cure the defect in the SHRCP Application. Contrary to SHRCP's submission, our studies indicate that SHRCP's amended proposal would provide first or second NCE service to 20,458 people, only 7.1 percent of the total service population of 289,179 people within the amended 60 dBμ contour.²⁰

Accordingly, we find that the SHRCP Application is defective because it fails to meet the third channel reservation standard and must be dismissed pursuant to Section 73.3566(a). We therefore will rescind our tentative selection of the SHRCP Application and dismiss the SHRCP Application as defective pursuant to Section 73.3566(a).

MPLC and CCT Applications. Because we are dismissing the tentatively selected SHRCP Application, we now turn to the MPLC and CCT Applications, tied with five points in the *Comparative Consideration Order*.²¹ Upon reviewing the technical proposals for the MPLC and CCT Applications, we find them similarly defective. CCT claims to provide aggregate first and second NCE service to 27,433 people, 10.2 percent of its total service population of 269,972 people.²² MPLC claims to provide aggregate first and second NCE service to 26,531 people, 10.5 percent of its total service population of 253,959 people.²³ However, we found that both applicants fail to attain the ten-percent threshold and, therefore, do not satisfy the requirements of the third channel reservation standard. Our studies show that CCT would provide first and second NCE service to 19,901 people, 7.0 percent of its total service population of 285,562 people; MPLC would provide first and second NCE service to 19,920 people, 7.6

¹⁶ See *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9094 n. 157 (MB 2011).

¹⁷ Opposition at 3; 47 C.F.R. § 73.3522(b)(2).

¹⁸ Reply at 4.

¹⁹ 47 C.F.R. § 73.7003(e). See also *Fair Distribution Threshold Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 24 FCC Rcd 12390, 12399 (MB 2009) (rejecting applicant's attempt to amend its application after the close of the filing window to claim a preference based solely on aggregated first and second NCE service).

²⁰ Our review revealed that the amended proposal failed to include an existing station whose contour overlaps with the proposed coverage area: KCSS(FM), Turlock, California (File No. BLEP-19990316KB).

²¹ See 47 C.F.R. § 73.7004(d) ("If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the new tentative selectee"). Although Crossroads also received five points, it did not file a petition for reconsideration of the dismissal of its application, and that dismissal is now final. See *supra* n. 2.

²² CCT Application, Exhibit 13.

²³ MPLC Application, Exhibit 13.

percent of its total service population of 260,982 people.²⁴ Accordingly, none of the remaining applications in NCE Reserved Allotment Group No. 8 would provide the requisite level of first and second NCE service. Therefore, we also dismiss the MPLC and CCT Applications pursuant to Section 73.3566(a) and conclude that the Channel 238A Westley, CA, allotment is unreserved by operation of law. The Media Bureau will include this allotment in an upcoming auction.²⁵

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Modesto Peace/Life Center on June 2, 2011 and the Petition to Deny filed by Calvary Church in Turlock, Inc. on June 2, 2011, ARE GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, that the tentative selection of Sacred Heart Roman Catholic Parish's application (File No. BNPED-20100226AJ0) IS RESCINDED and its application IS DISMISSED.

IT IS FURTHER ORDERED, that the applications of Modesto Peace/Life Center and Calvary Chapel of Turlock, Inc. (File Nos. BNPED-20100224ABX and BNPED-20100226AGO, respectively) ARE DISMISSED.

IT IS FURTHER ORDERED, that, pursuant to Section 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that effective July 27, 2012, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS MODIFIED BY OPERATION OF LAW with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Westley, California	238A

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ As did SHRCP, MPLC and CCT failed to include KCSS(FM) in their NCE coverage calculations. *See supra* n. 21.

²⁵ *See NCE Second Report and Order*, 18 FCC Rcd at 6705, *supra* n. 14.



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 12-1209
Release Date: July 27, 2012

**WIRELINE COMPETITION BUREAU SEEKS COMMENT ON
VIRGIN ISLANDS TELEPHONE CORP. D/B/A INNOVATIVE TELEPHONE PETITION FOR
WAIVER OF A HIGH-COST UNIVERSAL SERVICE FILING DEADLINE**

WC Docket Nos. 08-71, 10-90

Comment Date: August 10, 2012
Reply Comment Date: August 17, 2012

The Wireline Competition Bureau seeks comment on a petition filed by Virgin Islands Telephone Corp. d/b/a Innovative Telephone (Innovative) for a waiver of the filing deadline required by section 54.904(d) of the Commission's rules.¹ Section 54.904(d) sets forth the deadline for carriers eligible to receive Interstate Common Line Support to file an annual certification with the Universal Service Administrative Company and the Commission.²

Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document.³ Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).⁴

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554.

¹ Petition of Virgin Islands Telephone Corp. d/b/a/ Innovative Telephone for Waiver of Rule 54.904(d) of the Commission's Rules. WC Docket Nos. 08-71, 10-90 (filed July 23, 2012); 47 C.F.R. § 54.904(d).

² 47 C.F.R. § 54.904(d).

³ 47 C.F.R. §§ 1.415, 1.419.

⁴ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Red 11322 (1998).

The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington D.C. 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

- (1) Heidi Lankau, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-B511, Washington, D.C. 20554; e-mail: Heidi.Lankau@fcc.gov; and
- (2) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, D.C. 20554; e-mail: Charles.Tyler@fcc.gov.

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

For further information, please contact Heidi Lankau, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418-7400 or TTY (202) 418-0484.

- FCC -

⁵ 47 C.F.R. §§ 1.1200 *et seq.*



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-050
Internet: <http://www.fcc.gov>
TTY: 1-888-835-532

DA 12-1210
Released: July 27, 2012

DEMONSTRATIONS OF ONLINE PUBLIC INSPECTION FILE INTERFACE

MONDAY, July 30, 2012 at 9:00 am; and TUESDAY, July 31, 2012 at 4:00 pm

MM Docket No. 00-168; MM Docket No. 00-44

On July 30 and 31, 2012, the FCC will conduct public online “screensharing” demonstrations of the database it has developed to host the online public inspection file for television broadcast stations. The FCC will demonstrate the interface to be used by television stations to file documents required to be placed in the online database. The screensharing demonstration will be available online only and will provide high resolution views of the application screens and cover the material presented during the July 17, 2012 demonstration.

The database has been developed in connection with the FCC’s recent Order requiring television broadcast stations to post their public inspection files online in a central, Commission-hosted database.¹ These rules go into effect August 2, 2012.² The screensharing demonstration is part of the commitment made by the Commission to test the online public file and educate the public regarding its use. The demonstration will inform broadcasters and others of the design and content of the online file, how stations will upload information to the file, how file sharing tools like Dropbox and Box can be used for uploading, and other ways in which the FCC is working to facilitate access to its public databases.

Persons interested in participating may do so by visiting www.fcc.gov/events/demonstrations-online-public-inspection-file-interface, prior to the Monday or Tuesday session, and clicking the link for the appropriate session online and teleconference information. The online demonstration will provide access to an Internet site for viewing; the audio portion of the demonstration will be conducted by teleconference. Parties must join the call before the scheduled start time. Reasonable accommodations for people with disabilities are available upon request. Send an

¹ See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398), Second Report and Order*, MM Docket Nos. 00-168 and 00-44, FCC 12-44 (rel. April 27, 2012).

² See Public Notice, *Effective Date Announced for Online Publication of Broadcast Television Public Inspection Files*, MM Docket Nos. 00-168 and 00-44, DA 12-1507, rel. July 3, 2012.

THE OHIO STATE UNIVERSITY

email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY).

To the extent any participant submits information during the demonstration on which the participant intends the Commission to rely in the online public file proceeding, such information should be filed in the rulemaking docket in ECFS, as required under 47 C.F.R. § 1.1206.

For additional information, contact John Norton, john.norton@fcc.gov, (202) 418-7037, or Kim Matthews, kim.matthews@fcc.gov, (202) 418-2154, of the Media Bureau, Policy Division, or Greg Elin, greg.elin@fcc.gov, (202) 418-2210, of the Office of the Managing Director. For press inquiries, contact Tom Horan, thomas.horan@fcc.gov, (202) 418-2486.



Enforcement Bureau
Investigations and Hearings
Division

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

July 27, 2012

DA 12-1211

**SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
AND EMAIL**

Mr. Willard Ross Lanham
c/o Stephen N. Preziosi
Law Office of Stephen N. Preziosi P.C.
570 Seventh Avenue, Ninth Floor
New York, NY 10018

Re: Notice of Suspension and Initiation of Debarment Proceeding
File No. EB-12-IH-0847

Dear Mr. Lanham:

The Federal Communications Commission (Commission or FCC) has received notice of your conviction for theft of federal education funds in violation of 18 U.S.C. § 666(a)(1), and mail fraud in violation of 18 U.S.C. § 1341, in connection with the federal schools and libraries universal service support mechanism (E-Rate program).¹ Consequently, pursuant to 47 C.F.R. § 54.8, this letter constitutes official notice of your suspension from participating in activities associated with the E-Rate program. In addition, the Enforcement Bureau (Bureau) hereby notifies you that it will commence debarment proceedings against you.²

¹ Any further reference in this letter to "your conviction" refers to the jury's verdict finding you guilty on one count of theft of federal funds and three counts of mail fraud. Trial Transcript at 887, *United States v. Willard Lanham*, Jury Trial, No. 11 CR 548 GBD (S.D.N.Y. 2012) (Trial Tr.); *United States v. Willard Lanham*, No. 11 CR 548 GBD, Order (S.D.N.Y. June 13) (order denying motions for judgment of acquittal and for a new trial).

² See 47 C.F.R. § 0.111 (delegating authority to the Bureau to resolve universal service suspension and debarment proceedings). The Commission adopted debarment rules for the E-Rate program in 2003. See *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) (*Second Report and Order*) (adopting Section 54.521 to suspend and debar parties from the E-Rate program). In 2007 the Commission extended the debarment rules to apply to all federal universal service support mechanisms. *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*; *Federal-State Joint Board on Universal Service*; *Schools and Libraries Universal Service Support Mechanism*; *Rural Health Care Support Mechanism*; *Lifeline and Link Up: Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, Report and Order, 22 FCC Rcd 16372, app. C at 16410-12 (2007) (*Program Management Order*) (renumbering Section 54.521 of the universal service debarment rules as Section 54.8 and amending subsections (a)(1), (a)(5), (c), (d), (e)(2)(i), (e)(3), (e)(4), and (g)).

Willard Ross Lanham
July 27, 2012

I. Notice of Suspension

The Commission has established procedures to prevent persons who have “defrauded the government or engaged in similar acts through activities associated with or related to the [E-Rate program]” from receiving the benefits associated with that program.³ The statutory provisions and Commission rules relating to the E-Rate program are designed to ensure that all E-Rate funds are used for their intended purpose.⁴ For example, Section 254(h)(1)(B) of the Communications Act of 1934, as amended, requires E-Rate program applicants to make bona fide requests for services intended for educational purposes in order to receive E-Rate discounts.⁵ Further, the Commission has stated that “[a] funding request may not be bona fide where a service provider has charged the beneficiary an inflated price.”⁶ The Commission also limits E-Rate funding to certain eligible services, which does not include consulting services.⁷

On March 5, 2012, a jury rendered a guilty verdict convicting you on one count of theft of federal funds and three counts of mail fraud in connection with your activities as an E-Rate consultant for the New York City Department of Education (DOE).⁸ Your responsibilities as a DOE consultant included overseeing Project Connect, a project designed to bring Internet connectivity to New York City schools.⁹ On April 28, 2011, the Special Commissioner of Investigation for the New York City School District (SCI) released a report alleging, among

³ *Second Report and Order*, 18 FCC Rcd at 9225, para. 66; *Program Management Order*, 22 FCC Rcd at 16387, para. 32. The Commission’s debarment rules define a “person” as “[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized.” 47 C.F.R. § 54.8(a)(6).

⁴ *NEC-Business Network Solutions, Inc.*, Notice of Debarment and Order Denying Waiver Petition, 21 FCC Rcd 7491, 7493, para. 7 (2006).

⁵ 47 U.S.C. § 245(h)(1)(B); *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26409, para. 5 (2003), (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, para. 570 (1997)).

⁶ *Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15818, para. 30 (2004). The Commission has taken enforcement action against service providers who inflated their rates and subsequently requested E-Rate funding for those associated costs. See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Steven G. Mihaylo, Notice of Suspension and of Proposed Debarment, 20 FCC Rcd 1372 (Enf. Bur. 2005); see also Letter from Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Richard E. Brown, Notice of Debarment, 22 FCC Rcd 20569 (Enf. Bur. 2007) (debarment of service provider who inflated costs in an attempt to defraud the E-Rate program).

⁷ *Federal-State Joint Board on Universal Service, Total Communications, Inc., Site Link Communications, Inc., Requests for Review of Decisions of the Universal Service Administrator*, Order, 16 FCC Rcd 14020, 14023-24, para. 9 & n.23 (Com. Car. Bur. 2001) (*Site Link Order*).

⁸ Trial Tr. at 887.

⁹ See Trial Testimony of Tom Kambouras; Trial Tr. at 34-36; Testimony of Stephen Vigilante, Trial Tr. at 274-75.

Willard Ross Lanham
July 27, 2012

other matters, that you had orchestrated a fraudulent invoicing and billing scheme using DOE vendors and subcontractors to overcharge DOE for Project Connect.¹⁰

Testimony and documentary evidence admitted during your trial corroborates SCI's allegations. Specifically, witnesses testified that you: 1) arranged for employees of your company, Lanham Enterprises, Inc., to work as consultants for DOE,¹¹ 2) inflated their hourly rates far above their salaries,¹² and 3) arranged for Project Connect subcontractors to bill those inflated rates to a Project Connect contractor using invoices that misstated the true nature of the charges.¹³ Witnesses further testified you directed employees of that contractor to "bundle" the consultant charges with services eligible for E-Rate funding on invoices and billing spreadsheets sent to DOE in order to make it appear that the consultants were doing work associated with wiring the schools for Internet access service.¹⁴ Your scheme resulted in DOE being fraudulently billed more than \$3.6 million for Project Connect between 2002 and 2008, of which you profited approximately \$1.7 million.¹⁵ The DOE included at least a portion of these overcharges in its E-Rate funding requests for Project Connect.¹⁶

Pursuant to Section 54.8(b) of the Commission's rules,¹⁷ upon your conviction the Bureau is required to suspend you from participating in any activities associated with or related to the E-Rate program, including the receipt of funds or discounted services through the E-Rate program, or consulting with, assisting, or advising applicants or service providers regarding the E-Rate

¹⁰ Special Commissioner of Investigation Report to Hon. Dennis M. Walcott, Chancellor New York City Public Schools, Dep't of Education from Richard J. Condon, Special Commissioner of Investigation for the New York City School District, SCI Case No. 2008-4446, at 1 (Apr. 28, 2011), at <http://www.nycsci.org/reports/04-11%20Lanham%20Rpt.pdf> (*SCI Report*).

¹¹ Testimony of Michael Pizza, Trial Tr. at 162-66; Testimony of Stephen Vigilante, Trial Tr. at 289-96. These consultants also worked on a second project that you managed for DOE that involved reviewing, paying, and centralizing DOE's telephone bills. Testimony of Stephen Vigilante, Trial Tr. at 282, 290.

¹² Testimony of Tamika Stevenson, Trial Tr. at 218; *see also* SCI Report at 6 & n.18 (stating three of the consultants who were paid \$30 to \$70 per hour had their services billed to DOE at \$290 an hour or more).

¹³ Testimony of Christopher Louridas, Trial Tr. at 124-38; *see also* SCI Report at 7 & n.20.

¹⁴ Testimony of Christopher Louridas, Trial Tr. at 124-26; Testimony of Joseph Iacoviello, Trial Tr. at 81-82; Testimony of Stephen Vigilante, Trial Tr. at 294-96; Testimony of Willard Lanham, Trial Tr. at 613, 616-18, 636-38, 702-12, 735-38.

¹⁵ *See* Testimony of Valerie Batista, Trial Tr. at 453-54 (testifying that Verizon billed DOE \$3.9 million for the telecommunications consultants' work); SCI Report at 1 (stating that DOE paid Mr. Lanham approximately \$3.6 million for the consultants' work).

¹⁶ *See* Testimony of Stephen Vigilante, Trial Tr. at 274-75; *see also* News Release, Representative Charles B. Rangel, Ranking Democrat, Committee on Ways and Means, Chancellor Harold O. Levy and Congressman Charles Rangel Announce Utilization of Federal Assistance for School Modernization (Jan. 8, 2002), at http://www.house.gov/apps/list/speech/ny15_rangel/pr.wm.schoolsqzab.html (*News Release*) (stating Project Connect would be "largely financed through the federal E-[R]ate program").

¹⁷ 47 C.F.R. § 54.8(b); *see Second Report and Order*, 18 FCC Rcd at 9225-27, paras. 67-74.

Willard Ross Lanham
July 27, 2012

program.¹⁸ Your suspension becomes effective upon receipt of this letter or its publication in the Federal Register, whichever comes first.¹⁹

In accordance with the Commission's suspension and debarment rules, you may contest this suspension or the scope of this suspension by filing arguments, with any relevant documents, within thirty (30) calendar days of receipt of this letter or its publication in the Federal Register, whichever comes first.²⁰ Such requests, however, will not ordinarily be granted.²¹ The Bureau may reverse or limit the scope of suspension only upon a finding of extraordinary circumstances.²² The Bureau will decide any request to reverse or modify a suspension within ninety (90) calendar days of its receipt of such request.²³

II. Initiation of Debarment Proceedings

In addition to requiring your immediate suspension from the E-Rate program, your conviction is cause for debarment as defined in Section 54.8(c) of the Commission's rules.²⁴ Therefore, pursuant to Section 54.8(b) of the rules, your conviction requires the Bureau to commence debarment proceedings against you.²⁵

As with the suspension process, you may contest the proposed debarment or the scope of the proposed debarment by filing arguments and any relevant documentation within thirty (30) calendar days of receipt of this letter or its publication in the Federal Register, whichever comes first.²⁶ The Bureau, in the absence of extraordinary circumstances, will notify you of its decision to debar within ninety (90) calendar days of receiving any information you may have filed.²⁷ If

¹⁸ 47 C.F.R. § 54.8(a)(1), (d).

¹⁹ *Second Report and Order*, 18 FCC Rcd at 9226, para. 69; 47 C.F.R. § 54.8(e)(1).

²⁰ 47 C.F.R. § 54.8(e)(4).

²¹ *Id.*

²² *Id.* § 54.8(f).

²³ *See Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 C.F.R. § 54.8(e)(5).

²⁴ "Causes for suspension and debarment are conviction of or civil judgment for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural healthcare support mechanism, and the low-income support mechanism." 47 C.F.R. § 54.8(c). Associated activities "include the receipt of funds or discounted services through [the federal universal service] support mechanisms, or consulting with, assisting, or advising applicants or service providers regarding [the federal universal service] support mechanisms." *Id.* § 54.8(a)(1).

²⁵ *Id.* § 54.8(b).

²⁶ *Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 C.F.R. § 54.8(e)(3).

²⁷ *Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 C.F.R. § 54.8(e)(5).

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the Bureau decides to debar you, its decision will become effective upon either your receipt of a debarment notice or publication of the decision in the Federal Register, whichever comes first.²⁸

If and when your debarment becomes effective, you will be prohibited from participating in activities associated with or related to the E-Rate program for three years from the date of debarment.²⁹ The Bureau may set a longer debarment period or extend an existing debarment period if necessary to protect the public interest.³⁰

Please direct any response, if sent by messenger or hand delivery, to Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554, to the attention of Joy M. Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, with a copy to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, Federal Communications Commission. All messenger or hand delivery filings must be submitted without envelopes.³¹ If sent by commercial overnight mail (other than U.S. Postal Service (USPS) Express Mail and Priority Mail), the response must be sent to the Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, Maryland 20743. If sent by USPS First Class, Express Mail, or Priority Mail, the response should be addressed to Joy Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554, with a copy to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554. You shall also transmit a copy of your response via e-mail to Joy M. Ragsdale, Joy.Ragsdale@fcc.gov and to Theresa Z. Cavanaugh, Terry.Cavanaugh@fcc.gov.

²⁸ 47 C.F.R. § 54.8(e)(5). The Commission may reverse a debarment, or may limit the scope or period of debarment, upon a finding of extraordinary circumstances, following the filing of a petition by you or an interested party or upon motion by the Commission. *Id.* § 54.8(f).

²⁹ *Second Report and Order*, 18 FCC Rcd at 9225, para. 67; 47 C.F.R. § 54.8(d), (g).

³⁰ 47 C.F.R. § 54.8(g).

³¹ See *FCC Announces Change in Filing Location for Paper Documents*, Public Notice, 24 FCC Rcd 14312 (2009) for further filing instructions.

Willard Ross Lanham
July 27, 2012

If you have any questions, please contact Ms. Ragsdale via U.S. postal mail, e-mail, or by telephone at (202) 418-1697. You may contact me at (202) 418-1553 or at the e-mail address noted above if Ms. Ragsdale is unavailable.

Sincerely yours,

Theresa Z. Cavanaugh
Chief
Investigations and Hearings Division
Enforcement Bureau

cc: Johnnay Schrieber, Universal Service Administrative Company (via e-mail)
Rashann Duvall, Universal Service Administrative Company (via e-mail)
Brian A. Jacobs, U. S. Attorney's Office, Southern District of New York (via e-mail)
Alvin L. Bragg, Jr., U. S. Attorney's Office, Southern District of New York (via e-mail)
Paul M. Krieger, U. S. Attorney's Office, Southern District of New York (via e-mail)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Assessment and Collection of Regulatory Fees for	)	MD Docket No. 12-116
Fiscal Year 2012)	
)	
)	
)	

REPORT AND ORDER

Adopted: July 13, 2012

Released: July 19, 2012

By the Commission:

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I. INTRODUCTION AND SUMMARY

1. In this *Report and Order*, we conclude the process of assessing and collecting regulatory fees for Fiscal Year (“FY”) 2012 to collect \$339,844,000 in regulatory fees for FY 2012. Section 9(a)(1) of the Communications Act of 1934, as amended (the “Act”) directs the Commission to collect regulatory fees “to recover the costs of ... enforcement activities, policy and rulemaking activities, user information services, and international activities.”¹ Section 9(a)(2) stipulates that regulatory fees for the enumerated activities “shall be collected only if, and only in the total amounts, required in Appropriation Acts,” and must “be established in amounts that will result in collection, during each fiscal year, of any amount that can be reasonably be expected to equal the amount appropriated” for the performance of the activities enumerated in section 9(a)(1) during that fiscal year. Since FY 2009, Congress has directed the Commission to assess and collect regulatory fees in an amount equal to the entire amount appropriated.² Congress appropriated \$339,844,000 for the Commission in FY 2012,³ and the regulatory fees established in this *FY 2012 Report and Order* are calculated so as to collect this entire amount.⁴ In this annual regulatory fee proceeding, we retain many of the current methods, policies, and procedures for collecting section 9 regulatory fees adopted by the Commission in prior years. Consistent with our established practice, we intend to collect these regulatory fees during a September 2012 filing window in order to collect the required amount by the end of our fiscal year.⁵

2. In this *FY 2012 Report and Order*, we address the following issues: 1) incorporating 2010 Census data into our broadcast population data, 2) assessing a regulatory fee for each broadcasting facility operating either in an analog or digital mode (but not both) for Low Power, Class A, and TV Translators/Boosters, 3) maintaining the FY 2012 Interstate Telecommunications Service Provider (ITSP) fee rate at the same level as in FY 2011, 4) using an online filing system for the filing of requests for a refund, waiver, fee reduction, or deferment of payment of an application or regulatory fee, 5) maintaining

¹ 47 U.S.C. § 159(a).

² Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 657 (2009).

³ Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Div. C, Title V (December 23, 2011).

⁴ In FY 2011, the Commission’s collection target goal was \$335,794,000, and it collected \$342.04 million through September 30, 2011. Any over collection amount is unavailable for obligation pursuant to Public Law 112-74 (H.R. 2055), *Consolidated Appropriations Act 2012*, page 124.

⁵ The Commission also expects to release in the near future a *Notice of Proposed Rulemaking* that will propose to update our current cost allocation percentages and revise our cost allocation methodology. We expect to implement any changes that result from this rulemaking in FY 2013; they do not affect the fees set in this *FY 2012 Report and Order*.

the Commercial Mobile Radio Service ("CMRS") Messaging Service at the rate of \$.08 per subscriber, and 6) the Commission will continue to promote greater use of technology (and less use of paper) in improving its regulatory fee notification and collection processes. The resulting FY 2012 Schedule of Regulatory Fees appears in Attachment C.

II. REPORT AND ORDER

3. In this *FY 2012 Report and Order*, we retain the same regulatory fee methodology used in FY 2011 and in prior fiscal years, with some adjustments to maintain the FY 2012 ITSP fee rate at the same level as in FY 2011. These adjustments are reflected in the ITSP fee rate, as well as in the fee rates of all remaining fee categories listed in Attachment C.

4. Since FY 1999, the Commission has allocated the amount appropriated by Congress across the various fee categories, and then divided these allocated amounts by the number of estimated payment units in each fee category to determine the unit fee.⁶ As in prior years, for cases involving small multiyear fees (e.g., licenses that are renewed over a multiyear term), we divided the allocated amounts by their respective estimated payment units, as well as by the term of the license (5-year or 10-year) to determine the unit fee, which was then rounded to be consistent with the requirements of section 9(b)(2)(B) of the Act. This process is illustrated in Attachment B and yields the FY 2012 regulatory fees shown in Attachment C.

5. We then calculated the number of payment units subject to the fee. In some instances, Commission licensee databases were used in calculating payment units; in other instances, actual prior year payment records and/or industry and trade association projections were used.⁷ Where appropriate, we adjusted and rounded our final estimates to take into account factors that could affect the number of units for which a fee is paid⁸. Such factors include waivers and exemptions filed in FYs 2011 and 2012, as well as fluctuations in the number of licenses or station operators due to economic, technical, or other reasons. Our estimated FY 2012 payment units, therefore, were adjusted to account for the variable factors relevant to each fee category. The fee rate may also have been rounded or adjusted slightly to reflect these variables.

6. On May 4, 2012, we released the *FY 2012 Notice of Proposed Rulemaking*⁹ to seek comment on the proposed FY 2012 regulatory fees. We received two comments and no reply comments. We address the issues raised in our *FY 2012 Notice of Proposed Rulemaking* and the comments received below.

A. Regulatory Fee Obligations for AM and FM Radio Stations

7. The fee methodology for AM and FM radio stations is based on a number of factors, including facility attributes (e.g. power, channel/frequency) and the population served by each station. The calculation of the population served is determined by applying current United States Census Bureau data to the station's technical and engineering data, as detailed in Attachment E. In FY 2012, the Commission will incorporate the results of the 2010 Census data into our broadcast population data, which could precipitate a change in population count for some radio stations. These population counts, along with the station's class and type of service, are the basis for determining regulatory fees. We

⁶ In many instances, the regulatory fee amount is a flat fee per licensee or regulatee. In some instances, the fee amount represents a per-unit fee (such as for International Bearer Circuits), a per-unit subscriber fee (such as for Cable, Commercial Mobile Radio Service ("CMRS") Cellular/Mobile and CMRS Messaging), or a fee factor per revenue dollar (Interstate Telecommunications Service Provider ("ITSP") fee). The payment unit is the measure upon which the fee is based, such as a licensee, regulatee, or subscriber fee.

⁷ See Attachment D for a list of databases we consulted.

⁸ The use of "regulatee" in this Order refers to any payor of regulatory fees.

⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, Notice of Proposed Rulemaking, 77 FR 29275 (May 17, 2012) ("*FY 2012 Regulatory Fees NPRM*").

sought comment, but did not receive any on this issue. We conclude that the 2010 census data should be incorporated into our broadcast population data when determining regulatory fees.

B. Regulatory Fee Obligations for Digital Low Power, Class A, and TV Translators/Boosters

8. The digital transition to full-service television stations was completed on June 12, 2009, but Low Power, Class A, and TV Translators/Boosters are not required to make the digital transition until September 1, 2015. Historically, we have only considered the digital transition in the context of regulatory fees applicable to full-service television stations. Consequently, the “digital only” exemption does not apply to Low Power, Class A, and TV Translator/Booster facilities. Because the digital transition in the Low Power, Class A, and TV Translator/Booster facilities is still voluntary, these facilities may transition from analog to digital service at varying times prior to September 1, 2015. During this period of transition, licensees of Low Power, Class A, and TV Translator/Booster facilities may be operating in analog mode, in digital mode, or in an analog and digital simulcast mode. We sought comment on how this should be reflected in the regulatory fees paid by licensees of these facilities, but we did not receive any comments in response. In the absence of comment, we conclude that a single fee will be assessed for each facility regardless of whether it transmits in analog or digital mode, digital mode, or simulcasting in both analog and digital modes. As more of these facilities convert to digital mode, the Commission will revisit how regulatory fees will be assessed.

C. Regulatory Fee Obligations of Interstate Telecommunications Service Providers

9. In our *FY 2011 Report and Order*, we assessed the Interstate Telecommunications Service Provider (“ITSP”) industry a regulatory fee of \$.00375 per revenue dollar. This fee reflected the Commission’s decision to limit the increase in ITSP regulatory fees in light of the continuing decrease in the revenue base upon which ITSP regulatory fees are calculated, and pending a more comprehensive rebalancing of ITSP fees as part of our reexamination of the factual and methodological predicates of our regulatory fee program. This reexamination will commence shortly. For that reason we proposed in our *FY 2012 Notice of Proposed Rulemaking* to assess FY 2012 ITSP regulatory fees at the same fee rate as in FY 2011, and to allocate the remaining revenue requirement across all other fee categories.¹⁰

10. We received one comment from the United States Telecom Association (“USTA”). USTA supports the Commission’s effort to rebalance its regulatory fee structure, including updating the calculation of full-time equivalents (“FTEs”) and adjusting the way costs are currently allocated.¹¹ USTA also contends that today’s separate communication platforms, e.g. wireless, cable, and wireline, are capable of providing similar communication services, and it is therefore critical for the Commission to establish fee parity among the providers utilizing these platforms.¹²

11. We have initiated a separate proceeding in which we are requesting comment on these and other issues.¹³ Because we expect to use the comments that are received and other data in setting next year’s regulatory fees, we will adopt our proposal to maintain the FY 2012 ITSP fee rate in the interim at the FY 2011 rate of .00375.

D. Improving Public Information on Waiver Requests and Decisions

12. In our *FY 2012 Notice of Proposed Rulemaking*, we sought comment on requiring

¹⁰ See *FY 2012 Regulatory Fees NPRM*, at para. 17.

¹¹ United States Telecom Association, at page 1.

¹² USTA at page 1-2.

¹³ In the Matter of Procedures for Assessment and Collection of Regulatory Fees: Assessment and Collection of Regulatory Fees for Fiscal Year 2008, *Notice of Proposed Rulemaking*, FCC 12-77, MD Docket No. 12-201 (released on July 17, 2012).

regulatees filing a request for a refund, waiver, fee reduction, or deferment of payment of an application or regulatory fee to use an online filing system rather than submitting their requests in hardcopy format.¹⁴ We believe that an online filing system will complement other existing online Commission systems already in place, such as the Broadcast Radio and Television Electronic Filing System (more commonly referred to as CDBS), the Cable Operations and Licensing System (COALS), and Consumer Complaint Forms. The resulting fee waiver filing system will include such documents as the filed request, any relevant supporting documentation, and the resulting decision. We also proposed to apply the provisions of section 0.459 to requests that electronically-filed material be withheld from public inspection.¹⁵

13. We received no comments on this issue. We will therefore adopt our proposal and require that all requests for refunds, waivers, fee reductions, or deferments of payment be filed using an online system. We direct the Office of Managing Director to take the necessary steps to assist regulatees in transitioning to electronic filing.

E. Commercial Mobile Radio Services ("CMRS") Messaging Service

14. In response to our *FY 2012 Notice of Proposed Rulemaking*, the Commission received a comment from the Critical Messaging Association ("CMA") regarding the CMRS messaging service regulatory fee category. CMA contends that even though the Commission has not acted on its *FY 2008 Further Notice of Proposed Rulemaking* to review, among other things, the CMRS messaging service fee category, the Commission should maintain the CMRS messaging fee at \$.08 per subscriber as a minimum appropriate action to take in FY 2012.¹⁶ As stated in paragraph 11, we anticipate revising our regulatory fee program in time to calculate FY 2013 fees. For that reason, and because we agree with CMA that the prevailing circumstances in FY 2003 still exist today,¹⁷ we find it appropriate that the FY 2012 CMRS Messaging regulatory fee remain at a rate of \$.08 per subscriber.

F. Administrative and Operational Issues

15. In FY 2009, the Commission implemented several procedural changes that simplified the payment and reconciliation processes of regulatory fees. In FY 2012, the Commission will continue to promote greater use of technology (and less use of paper) in improving our regulatory fee notification and collection processes. We sought comment on how we might do this, but we received no specific comment in response. Accordingly, the Commission will continue its own efforts to promote greater efficiency in its regulatory fee notification and collection processes, subject to appropriate notice and comment.

16. In FY 2009, we instituted a mandatory filing requirement using the Commission's electronic filing and payment system (also known as "Fee Filer").¹⁸ Regulatees filing their annual regulatory fee payments were required to begin the process by entering the Commission's Fee Filer

¹⁴ See *FY 2012 Regulatory Fees NPRM* at para. 18.

¹⁵ Specifically, section 0.457(a) (2) through (g) describe, *inter alia*, how confidential material should be submitted electronically, what showings must be made to justify withholding electronically-submitted information from public inspection, and how the Commission will resolve confidentiality requests.

¹⁶ The Critical Messaging Association at page 1.

¹⁷ Beginning in FY 2003, the Commission maintained the paging regulatory fee rate at \$.08 per subscriber, the same level as in FY 2002, and it has maintained this level of \$.08 per subscriber for all subsequent years. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003, Report and Order*, 18 FCC Rcd 15988 ¶¶ 21-22 (2003) (*FY 2003 Report and Order*).

¹⁸ See *Assessment and Collection of Regulatory Fees for Fiscal Year FY 2009, Report and Order* 24 FCC Rcd 10301 at paras. 20 and 21 ("FY 2009 Report and Order").

system with a valid FCC Registration Number ("FRN") and password.¹⁹ This change, which required regulatees to use Fee Filer for the *filing* of annual regulatory fees, not the *payment* of such regulatory fees²⁰ was beneficial to both licensees and to the Commission. For licensees, the mandatory use of Fee Filer eliminates the need to manually complete and submit a hardcopy Form 159, and for the Commission, the data in electronic format makes it much easier to process payments efficiently and effectively. We sought comment on how to improve the mandatory use of Fee Filer for filing annual regulatory fees. We received no specific comments or reply comments on this issue. Accordingly, we will continue our own efforts to refine our fee filing and payment procedures, subject to appropriate notice and comment.

III. FEE COLLECTION PROCEDURES

17. Included below are procedural items as well as our current payment and collection methods which we have revised over the past several years to expedite the processing of regulatory fee payments. We do not propose changes to these procedures. Rather, we include them here as a useful way of reminding regulatory fee payers and the public about these aspects of the annual regulatory fee collection process.

A. Public Notices and Fact Sheets

18. Each year we post public notices and fact sheets pertaining to regulatory fees on our website. These documents contain information about the payment due date and relevant regulatory fee payment procedures. We will continue to post this information on <http://transition.fcc.gov/fees/regfees.html>, rather than mailing it to regulatees.

B. Pre-Bill Notification and Collection of Regulatory Fees

19. In prior years, the Commission mailed pre-bills via surface mail to regulatees in select regulatory fee categories: ITSPs, Geostationary ("GSO") and Non-Geostationary ("NGSO") satellite space station licensees,²¹ holders of Cable Television Relay Service ("CARS") licenses, and Earth Station licensees.²² The remaining regulatees did not receive pre-bills. In our *FY 2009 Report and Order*, the Commission decided to make the information contained in these pre-bills viewable in Fee Filer, rather than mailing pre-bills to licensees via surface mail.²³ We continued this practice in FY 2010 and FY 2011 by placing the pre-bill information on Fee Filer, where it could be accessed by regulatees through the Commission's website. Regulatees can also look to the Commission's website for information on upcoming events and deadlines relating to regulatory fees.

¹⁹ In order to do this, licensees must have a current and valid FRN address on file in the Commission's Registration System (CORES).

²⁰ Regulatees have different options when making a payment, including credit card, check, and wire transfer.

²¹ Geostationary orbit space station ("GSO") licensees received regulatory fee pre-bills for satellites that (1) were licensed by the Commission and operational on or before October 1 of the respective fiscal year; and (2) were not co-located with and technically identical to another operational satellite on that date (*i.e.*, were not functioning as a spare satellite). Non-geostationary orbit space station ("NGSO") licensees received regulatory fee pre-bills for systems that were licensed by the Commission and operational on or before October 1 of the respective fiscal year.

²² A pre-bill is considered an account receivable in the Commission's accounting system. Pre-bills reflect the amount owed and have a payment due date of the last day of the regulatory fee payment window. Consequently, if a pre-bill is not paid by the due date, it becomes delinquent and is subject to our debt collection procedures. *See also* 47 C.F.R. §§ 1.1161(c), 1.1164(f)(5), and 1.1910.

²³ *See FY 2009 Report and Order* at ¶¶ 24, 26.

C. Assessment Notifications**1. Media Services Licensees**

20. Beginning in FY 2003, we sent fee assessment notifications via surface mail to media services entities on a per-facility basis.²⁴ These notifications provided the assessed fee amount for the facility in question, as well as the data attributes that determined the fee amount. We have since refined this initiative to be more electronic and paperless.²⁵ In our *FY 2010 Notice of Proposed Rulemaking*, we sought comment to discontinue mailing the media notifications beginning in FY 2011, relying instead on information on the Commission's website and the use of the Commission-authorized website at www.fccfees.com.²⁶ We received no comments or reply comments in FY 2010, and beginning in FY 2011, we discontinued the mailing of fee assessment notifications via surface mail to media service entities. In FY 2012, we will continue the practice of not mailing hardcopy notification assessment letters to media licensees.

2. CMRS Cellular and Mobile Services Assessments

21. We will continue to follow our current procedures for conveying CMRS subscriber counts to providers. We will mail an initial assessment letter to Commercial Mobile Radio Service (CMRS) providers using data from the Numbering Resource Utilization Forecast ("NRUF") report that is based on "assigned" number counts that have been adjusted for porting to net Type 0 ports ("in" and "out").²⁷ The letter will include a listing of the carrier's Operating Company Numbers ("OCNs") upon which the assessment is based.²⁸ The letters will not include OCNs with their respective assigned number counts, but rather, an aggregate total of assigned numbers for each carrier.

22. A carrier wishing to revise its subscriber count can do so by accessing Fee Filer after receiving its initial CMRS assessment letter. Providers should follow the prompts in Fee Filer to record their subscriber revisions, along with any supporting documentation.²⁹ The Commission will then review the revised count and supporting documentation and either approve or disapprove the submission in Fee Filer. If the submission is disapproved, the Commission will contact the provider to afford the provider an opportunity to discuss its revised subscriber count and/or provide additional supporting documentation. If we receive no response or correction to the initial assessment letter, or we do not reverse our initial disapproval of the provider's revised count submission, we expect the fee payment to be based on the number of subscribers listed on the initial assessment letter. Once the timeframe for revision has passed, the subscriber counts are final and are the basis upon which CMRS regulatory fees are expected to be paid. Providers can also view their final subscriber counts online in Fee Filer. A final CMRS assessment

²⁴ An assessment is a proposed statement of the amount of regulatory fees owed by an entity to the Commission (or proposed subscriber count to be ascribed for purposes of setting the entity's regulatory fee), but it is not entered into the Commission's accounting system as a current debt.

²⁵ Those refinements include providing licensees with a Commission-authorized website where they can update or correct any information concerning their facilities, and amend their fee-exempt status, if need be. The notifications also provide licensees with a telephone number to call in the event that they need customer assistance.

²⁶ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2010*, Report and Order, 25 FCC Rcd 9278 at para. 42 (2010) ("FY 2010 Report and Order").

²⁷ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2005 and Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Docket Nos. 05-59 and 04-73, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12264, ¶¶ 38-44 (2005).

²⁸ *Id.*

²⁹ In the supporting documentation, the provider will need to state a reason for the change, such as a purchase or sale of a subsidiary, the date of the transaction, and any other pertinent information that will help to justify a reason for the change.

letter will not be mailed out.

23. Because some carriers do not file the NRUF report, they may not receive an initial assessment letter. In these instances, the carriers should compute their fee payment using the standard methodology³⁰ that is currently in place for CMRS Wireless services (e.g., compute their subscriber counts as of December 31, 2011), and submit their fee payment accordingly. Whether a carrier receives an assessment letter or not, the Commission reserves the right to audit the number of subscribers for which regulatory fees are paid. In the event that the Commission determines that the number of subscribers paid is inaccurate, the Commission will bill the carrier for the difference between what was paid and what should have been paid.

D. Streamlined Regulatory Fee Payment Process

1. Cable Television

24. The Commission will continue to permit cable television operators to base their regulatory fee payment on their company's aggregate year-end subscriber count, rather than requiring them to report cable subscriber counts on a per community unit identifier ("CUID") basis. This significantly lessens the cable operators' burden in calculating and paying their regulatory fees.

2. CMRS Cellular and Mobile Providers

25. In FY 2006, we streamlined the CMRS payment process by eliminating the requirement for CMRS providers to identify their individual call signs when making their regulatory fee payment, instead allowing CMRS providers to pay their regulatory fees only at the aggregate subscriber level without having to identify their various call signs.³¹ We will continue this practice in FY 2012. In FY 2007, we consolidated the CMRS cellular and CMRS mobile fee categories into one fee category with a single fee code, thereby eliminating the requirement for CMRS providers to separate their subscriber counts into CMRS cellular and CMRS mobile fee categories during the regulatory fee payment process. This consolidation of fee categories enabled the Commission to process payments more quickly and accurately. For FY 2012, we will continue this practice of combining the CMRS cellular and CMRS mobile fee categories into one regulatory fee category.

3. Interstate Telecommunications Service Providers

26. In FY 2007, we adopted a proposal to round lines 14 (total subject revenues) and 16 (total regulatory fee owed) on FCC Form 159-W worksheet to the nearest dollar. This revision enabled the Commission to process the ITSP regulatory fee payments more quickly because rounding was performed in a consistent manner, thereby eliminating processing issues. For FY 2012, we will continue to round lines 14 and 16 when calculating the FY 2012 ITSP fee obligation. In addition, we will continue the practice of not mailing out Form 159-W via surface mail.

E. Payment of Regulatory Fees

1. Lock Box Bank

27. All lock box payments to the Commission for FY 2012 will be processed by U.S. Bank, St. Louis, Missouri, and payable to the FCC. During the fee season for collecting FY 2012 regulatory fees, regulatees can pay their fees by credit card through Pay.gov,³² by check, money order, or debit

³⁰ See, e.g., Federal Communications Commission, *Regulatory Fees Fact Sheet: What You Owe - Commercial Wireless Services for FY 2011* at 1 (rel. September 2011).

³¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Docket No. 06-68, Report and Order, 21 FCC Rcd 8092, 8105, ¶ 48 (2006).

³² In accordance with U.S. Treasury Financial Manual Announcement No. A-2012-02, the U.S. Treasury will reject credit card transactions greater than \$49,999.99 from a single credit card in a single day. This includes online (continued....)

card,³³ or by placing their credit card number on Form 159-E (Remittance Advice form) and mailing their fee and accompanying Form 159-E to the following address: Federal Communications Commission, Regulatory Fees, P.O. Box 979084, St. Louis, MO 63197-9000. Additional payment options and instructions are posted at <http://transition.fcc.gov/fees/regfees.html>.

2. Receiving Bank for Wire Payments

28. The receiving bank for all wire payments is the Federal Reserve Bank, New York, New York (TREAS NYC). When making a wire transfer, regulatees must fax a copy of their Fee Filer generated Form 159-E to U.S. Bank, St. Louis, Missouri at (314) 418-4232 at least one hour before initiating the wire transfer (but on the same business day) so as not to delay crediting their account. Regulatees should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer to allow sufficient time for the transfer to be initiated and completed before the deadline. Complete instructions for making wire payments are posted at <http://transition.fcc.gov/fees/wiretran.html>.

3. De Minimis Regulatory Fees

29. Regulatees whose total FY 2012 regulatory fee liability, including all categories of fees for which payment is due, is less than \$10 are exempted from payment of FY 2012 regulatory fees.

4. Standard Fee Calculations and Payment Dates

30. The Commission will accept fee payments made in advance of the window for the payment of regulatory fees. The responsibility for payment of fees by service category is as follows:

- *Media Services:* Regulatory fees must be paid for initial construction permits that were granted on or before October 1, 2011 for AM/FM radio stations, VHF/UHF full service television stations, and satellite television stations. Regulatory fees must be paid for all broadcast facility licenses granted on or before October 1, 2011. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- *Wireline (Common Carrier) Services:* Regulatory fees must be paid for authorizations that were granted on or before October 1, 2011. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date. We note that audio bridging service providers are included in this category.³⁴

(Continued from previous page) _____

transactions conducted via Pay.gov, transactions conducted via other channels, and direct-over-the counter transactions made at a U.S. Government facility. Individual credit card transactions larger than the \$49,999.99 limit may not be split into multiple transactions using the same credit card, whether or not the split transactions are assigned to multiple days. Splitting a transaction violates card network and Financial Management Service (FMS) rules. However, credit card transactions exceeding the daily limit may be split between two or more different credit cards. Other alternatives for transactions exceeding the \$49,999.99 credit card limit include payment by check, electronic debit from your bank account, and wire transfer.

³³ In accordance with U.S. Treasury Financial Manual Announcement No. A-2012-02, the maximum dollar-value limit for debit card transactions will be eliminated. It should also be noted that only Visa and MasterCard branded debit cards are accepted by Pay.gov.

³⁴ Audio bridging services are toll teleconferencing services, and audio bridging service providers are required to contribute directly to the Universal Service Fund based on revenues from these services. On June 30, 2008, the Commission released the *InterCall Order*, in which the Commission stated that InterCall, Inc. and all similarly situated audio bridging service providers are required to contribute directly to the Universal Service Fund. See *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008) (“*InterCall Order*”).

- *Wireless Services:* CMRS cellular, mobile, and messaging services (fees based on number of subscribers or telephone number count): Regulatory fees must be paid for authorizations that were granted on or before October 1, 2011. The number of subscribers, units, or telephone numbers on December 31, 2011 will be used as the basis from which to calculate the fee payment. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- The first eleven regulatory fee categories in our Schedule of Regulatory Fees (*see Attachment C*) pay “small multi-year wireless regulatory fees.” Entities pay these regulatory fees in advance for the entire amount of their five-year or ten-year term of initial license, and only pay regulatory fees again when the license is renewed or a new license is obtained. We include these fee categories in our Schedule of Regulatory Fees to publicize our estimates of the number of “small multi-year wireless” licenses that will be renewed or newly obtained in FY 2012.
- *Multichannel Video Programming Distributor Services (cable television operators and CARS licensees):* Regulatory fees must be paid for the number of basic cable television subscribers as of December 31, 2011.³⁵ Regulatory fees also must be paid for CARS licenses that were granted on or before October 1, 2011. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- *International Services:* Regulatory fees must be paid for earth stations, geostationary orbit space stations and non-geostationary orbit satellite systems that were licensed and operational on or before October 1, 2011. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- *International Services: Submarine Cable Systems:* Regulatory fees for submarine cable systems are to be paid on a per cable landing license basis based on circuit capacity as of December 31, 2011. In instances where a license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the license as of the fee due date. For regulatory fee purposes, the allocation in FY 2012 will remain at 87.6 percent for submarine cable and 12.4 percent for satellite/terrestrial facilities.
- *International Services: Terrestrial and Satellite Services:* Finally, regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, 2011 in any terrestrial or satellite transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. “Active circuits” for these purposes include backup and redundant circuits as of December 31, 2011. Whether circuits are used specifically for voice or data is not relevant for purposes of determining that they are active

³⁵ Cable television system operators should compute their number of basic subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households. Operators may base their count on “a typical day in the last full week” of December 2011, rather than on a count as of December 31, 2011.

circuits. In instances where a permit or license is transferred or assigned after October 1, 2011, responsibility for payment rests with the holder of the permit or license as of the fee due date. For regulatory fee purposes, the allocation in FY 2012 will remain at 87.6 percent for submarine cable and 12.4 percent for satellite/terrestrial facilities.

F. Enforcement

31. To be considered timely, regulatory fee payments must be received and stamped at the lockbox bank by the due date of regulatory fees. Section 9(c) of the Act requires us to impose a late payment penalty of 25 percent of the unpaid amount to be assessed on the first day following the deadline date for filing of these fees.³⁶ Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in section 1.1910 of the Commission's Rules³⁷ and in the Debt Collection Improvement Act of 1996 ("DCIA").³⁸ We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and section 1.1940(d) of the Commission's Rules.³⁹ These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In case of partial payments (underpayments) of regulatory fees, the payor will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner.

32. We will withhold action on any applications or other requests for benefits filed by anyone who is delinquent in any non-tax debts owed to the Commission (including regulatory fees) and will ultimately dismiss those applications or other requests if payment of the delinquent debt or other satisfactory arrangement for payment is not made.⁴⁰ Failure to pay regulatory fees can also result in the initiation of a proceeding to revoke any and all authorizations held by the entity responsible for paying the delinquent fee(s).

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

33. As required by the Regulatory Flexibility Act of 1980 ("RFA"),⁴¹ the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Report and Order. The FRFA is set forth in Attachment F.

B. Final Paperwork Reduction Act of 1995 Analysis

34. This *Report and Order* does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506 (c) (4).

³⁶ 47 U.S.C. § 159(c).

³⁷ *See* 47 C.F.R. § 1.1910.

³⁸ Delinquent debt owed to the Commission triggers application of the "red light rule" which requires offsets or holds on pending disbursements. 47 C.F.R. § 1.1910. In 2004, the Commission adopted rules implementing the requirements of the DCIA. *See Amendment of Parts 0 and 1 of the Commission's Rules*, MD Docket No. 02-339, Report and Order, 19 FCC Red 6540 (2004); 47 C.F.R. Part 1, Subpart O, Collection of Claims Owed the United States.

³⁹ 47 C.F.R. § 1.1940(d).

⁴⁰ *See* 47 C.F.R. §§ 1.1161(c), 1.1164(f)(5), and 1.1910.

⁴¹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

C. Congressional Review Act Analysis

35. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.⁴²

V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 159, and 303(r), this *Report and Order* IS HEREBY ADOPTED.

37. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis in Attachment F, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴² See 5 U.S.C. § 801(a)(1)(A). The Congressional Review Act is contained in Title II, § 251, of the CWAAA: see Pub. L. No. 104-121, Title II, § 251, 110 Stat. 868.

ATTACHMENT A**List of Commenters**

Commenter	Abbreviated name
Critical Messaging Association	"CMA"
The United States Telecom Association	"USTA"

ATTACHMENT B

Calculation of FY 2012 Revenue Requirements and Pro-Rata Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted at the time the application is filed.

Fee Category	FY 2012 Payment Units	Years	FY 2011 Revenue Estimate	Pro-Rated FY 2012 Revenue Require- ment	Computed New FY 2012 Regulatory Fee	Rounded New FY 2012 Regula- tory Fee	Expected FY 2012 Revenue
PLMRS (Exclusive Use)	1,400	10	480,000	501,024	36	35	490,000
PLMRS (Shared use)	15,000	10	2,120,000	2,397,759	16	15	2,250,000
Microwave	13,200	10	2,550,000	2,361,972	18	20	2,640,000
218-219 MHz (Formerly IVDS)	5	10	1,950	3,579	72	70	3,500
Marine (Ship)	6,550	10	670,000	787,324	12	10	655,000
GMRS	7,700	5	232,500	286,300	7	5	192,500
Aviation (Aircraft)	2,900	10	460,000	357,874	12	10	290,000
Marine (Coast)	285	10	132,500	143,150	50	50	142,500
Aviation (Ground)	900	10	165,000	143,150	16	15	135,000
Amateur Vanity Call Signs	14,300	10	207,320	214,725	1.50	1.50	214,500
AM Class A ^{4a}	61	1	257,400	250,512	4,107	4,100	250,100
AM Class B ^{4b}	1,471	1	3,057,875	3,113,508	2,117	2,125	3,125,875
AM Class C ^{4c}	869	1	1,078,650	1,109,411	1,277	1,275	1,107,975
AM Class D ^{4d}	1,541	1	3,642,325	3,686,107	2,392	2,400	3,698,400
FM Classes A, B1 & C3 ^{4e}	3,055	1	7,629,300	7,759,664	2,548	2,550	7,764,750
FM Classes B, C, C0, C1 & C2 ^{4f}	3,020	1	9,410,775	9,513,249	3,150	3,150	9,513,000
AM Construction Permits	65	1	44,100	35,787	551	550	35,750
FM Construction Permits ¹	120	1	101,925	84,000	700	700	84,000
Satellite TV	125	1	166,250	178,937	1,431	1,425	178,125
Satellite TV Construction Permit	4	1	2,010	3,579	895	895	3,580
VHF Markets 1-10	22	1	1,692,500	1,761,769	80,080	80,075	1,761,650
VHF Markets 11-25	25	1	1,772,550	1,836,977	73,479	73,475	1,836,875
VHF Markets 26-50	38	1	1,457,100	1,512,153	39,793	39,800	1,512,400
VHF Markets 51-100	60	1	1,183,000	1,255,187	20,920	20,925	1,255,500

Fee Category	FY 2012 Payment Units	Years	FY 2011 Revenue Estimate	Pro-Rated FY 2012 Revenue Require- ment	Computed New FY 2012 Regulatory Fee	Rounded New FY 2012 Regula- tory Fee	Expected FY 2012 Revenue
VHF Remaining Markets	137	1	774,700	798.915	5,831	5,825	798,025
VHF Construction Permits ¹	2	1	12,200	11.650	5,825	5,825	11,650
UHF Markets 1-10	109	1	3,915,450	3,854,222	35,360	35,350	3,853,150
UHF Markets 11-25	106	1	3,525,650	3,456,927	32,613	32,625	3,458,250
UHF Markets 26-50	135	1	3,016,800	2,958,639	21,916	21,925	2,959,875
UHF Markets 51- 100	225	1	2,933,350	2,868,448	12,749	12,750	2,868,750
UHF Remaining Markets	247	1	864,600	847,308	3,430	3,425	845,975
UHF Construction Permits ¹	7	1	32,750	23,975	3,425	3,425	23,975
Broadcast Auxiliaries	24,800	1	268,500	286,300	12	10	248,000
LPTV/Translators/ Boosters/Class A TV	3,732	1	1,424,765	1,431,498	384	385	1,436,820
CARS Stations	375	1	173,900	178,937	477	475	178,125
Cable TV Systems	62,200,000	1	58,962,000	59,228,227	0.9522	0.95	59,090,000
Interstate Telecommunication Service Providers	\$39,700,000,000	1	148,125,000 0	148,875,000	0.003750	0.00375	148,875,000
CMRS Mobile Services (Cellular/Public Mobile)	313,000,000	1	50,660,000	52,156,612	0.1666	0.17	53,210,000
CMRS Messaging Services	3,400,000	1	336,000	272,000	0.0800	0.080	272,000
BRS ²	950	1	523,900	451,250	475	475	451,250
LMDS	475	1	161,200	225,625	475	475	225,625
Per 64 kbps Int'l Bearer Circuits Terrestrial (Common) & Satellite (Common & Non-Common)	4,452,315	1	1,136,518	1,153,787	.259	.26	1,157,602
Submarine Cable Providers (see chart in Appendix C) ³	38,313	1	8,080,734	8,150,949	212,749	212,750	8,150,984
Earth Stations	3,250	1	875,875	894,686	275	275	893,750
Space Stations (Geostationary)	87	1	11,429,625	11,559,346	132,866	132,875	11,560,125

THE COUNCIL ON COMPETITIVENESS

Fee Category	FY 2012 Payment Units	Years	FY 2011 Revenue Estimate	Pro-Rated FY 2012 Revenue Require- ment	Computed New FY 2012 Regulatory Fee	Rounded New FY 2012 Regula- tory Fee	Expected FY 2012 Revenue
Space Stations (Non-Geostationary)	6	1	850,500	858,899	143,150	143,150	858,900
***** Total Estimated Revenue to be Collected			336,599.04 7	339,840,896			340,568.811
***** Total Revenue Requirement			335,794.00 0	339,844,000			339,844,000
Difference			805,048	(3,104)			724,811

¹ The FM Construction Permit revenues and the VHF and UHF Construction Permit revenues were adjusted to set the regulatory fee to an amount no higher than the lowest licensed fee for that class of service. The reductions in the FM Construction Permit revenues are offset by increases in the revenue totals for FM radio stations. Similarly, reductions in the VHF and UHF Construction Permit revenues are offset by increases in the revenue totals for VHF and UHF television stations, respectively.

² MDS/MMDS category was renamed Broadband Radio Service (BRS). See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report & Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169, ¶ 6 (2004).

³ The chart at the end of Attachment C lists the submarine cable bearer circuit regulatory fees (common and non-common carrier basis) that resulted from the adoption of the following proceedings: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order (MD Docket No. 08-65, RM-11312), released March 24, 2009; and *Assessment and Collection of Regulatory Fees for Fiscal Year 2009 and Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Notice of Proposed Rulemaking and Order (MD Docket No. 09-65, MD Docket No. 08-65), released on May 14, 2009.

⁴ The fee amounts listed in the column entitled "Rounded New FY 2012 Regulatory Fee" constitute a weighted average media regulatory fee by class of service. The actual FY 2012 regulatory fees for AM/FM radio station are listed on a grid located at the end of Attachment C.

ATTACHMENT C

FY 2012 Schedule of Regulatory Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted at the time the application is filed.

Fee Category	Annual Regulatory Fee (U.S. \$'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	35
Microwave (per license) (47 CFR part 101)	20
218-219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	70
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	50
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	15
PLMRS (Shared Use) (per license) (47 CFR part 90)	15
Aviation (Aircraft) (per station) (47 CFR part 87)	10
Aviation (Ground) (per license) (47 CFR part 87)	15
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.50
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.17
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/ MDS) (per license) (47 CFR part 27)	475
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	475
AM Radio Construction Permits	550
FM Radio Construction Permits	700
TV (47 CFR part 73) VHF Commercial	
Markets 1-10	80,075
Markets 11-25	73,475
Markets 26-50	39,800
Markets 51-100	20,925
Remaining Markets	5,825
Construction Permits	5,825
TV (47 CFR part 73) UHF Commercial	

Fee Category	Annual Regulatory Fee (U.S. \$'s)
Markets 1-10	35,350
Markets 11-25	32,625
Markets 26-50	21,925
Markets 51-100	12,750
Remaining Markets	3,425
Construction Permits	3,425
Satellite Television Stations (All Markets)	1,425
Construction Permits – Satellite Television Stations	895
Low Power TV, Class A TV, TV/FM Translators & Boosters (47 CFR part 74)	385
Broadcast Auxiliaries (47 CFR part 74)	10
CARS (47 CFR part 78)	475
Cable Television Systems (per subscriber) (47 CFR part 76)	.95
Interstate Telecommunication Service Providers (per revenue dollar)	.00375
Earth Stations (47 CFR part 25)	275
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100)	132,875
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	143,150
International Bearer Circuits - Terrestrial/Satellites (per 64KB circuit)	.26
International Bearer Circuits - Submarine Cable	See Table Below

FY 2012 SCHEDULE OF REGULATORY FEES (continued)

FY 2012 RADIO STATION REGULATORY FEES						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	\$725	\$600	\$550	\$625	\$700	\$875
25,001 – 75,000	\$1,475	\$1,225	\$850	\$950	\$1,425	\$1,550
75,001 – 150,000	\$2,200	\$1,525	\$1,125	\$1,600	\$1,950	\$2,875
150,001 – 500,000	\$3,300	\$2,600	\$1,675	\$1,900	\$3,025	\$3,750
500,001 – 1,200,000	\$4,775	\$3,975	\$2,800	\$3,175	\$4,800	\$5,525
1,200,001 – 3,000,00	\$7,350	\$6,100	\$4,200	\$5,075	\$7,800	\$8,850
>3,000,000	\$8,825	\$7,325	\$5,325	\$6,350	\$9,950	\$11,500

FY 2012 SCHEDULE OF REGULATORY FEES
International Bearer Circuits - Submarine Cable

Submarine Cable Systems (capacity as of December 31, 2011)	Fee amount	Address
< 2.5 Gbps	\$13,300	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
2.5 Gbps or greater, but less than 5 Gbps	\$26,600	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
5 Gbps or greater, but less than 10 Gbps	\$53,200	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
10 Gbps or greater, but less than 20 Gbps	\$106,375	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
20 Gbps or greater	\$212,750	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000

ATTACHMENT D

Sources of Payment Unit Estimates for FY 2012

In order to calculate individual service fees for FY 2012, we adjusted FY 2011 payment units for each service to more accurately reflect expected FY 2012 payment liabilities. We obtained our updated estimates through a variety of means. For example, we used Commission licensee data bases, actual prior year payment records and industry and trade association projections when available. The databases we consulted include our Universal Licensing System ("ULS"), International Bureau Filing System ("IBFS"), Consolidated Database System ("CDBS") and Cable Operations and Licensing System ("COALS"), as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast*.

We sought verification for these estimates from multiple sources and, in all cases, we compared FY 2012 estimates with actual FY 2011 payment units to ensure that our revised estimates were reasonable. Where appropriate, we adjusted and/or rounded our final estimates to take into consideration the fact that certain variables that impact on the number of payment units cannot yet be estimated with sufficient accuracy. These include an unknown number of waivers and/or exemptions that may occur in FY 2012 and the fact that, in many services, the number of actual licensees or station operators fluctuates from time to time due to economic, technical, or other reasons. When we note, for example, that our estimated FY 2012 payment units are based on FY 2011 actual payment units, it does not necessarily mean that our FY 2012 projection is exactly the same number as in FY 2011. We have either rounded the FY 2012 number or adjusted it slightly to account for these variables.

FEE CATEGORY	SOURCES OF PAYMENT UNIT ESTIMATES
Land Mobile (All), Microwave, 218-219 MHz, Marine (Ship & Coast), Aviation (Aircraft & Ground), GMRS, Amateur Vanity Call Signs, Domestic Public Fixed	Based on Wireless Telecommunications Bureau ("WTB") projections of new applications and renewals taking into consideration existing Commission licensee data bases. Aviation (Aircraft) and Marine (Ship) estimates have been adjusted to take into consideration the licensing of portions of these services on a voluntary basis.
CMRS Cellular/Mobile Services	Based on WTB projection reports, and FY 11 payment data.
CMRS Messaging Services	Based on WTB reports, and FY 11 payment data.
AM/FM Radio Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2011 payment units.
UHF/VHF Television Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2011 payment units.
AM/FM/TV Construction Permits	Based on CDBS data, adjusted for exemptions, and actual FY 2011 payment units.
LPTV, Translators and Boosters, Class A Television	Based on CDBS data, adjusted for exemptions, and actual FY 2011 payment units.
Broadcast Auxiliaries	Based on actual FY 2011 payment units.
BRS (formerly MDS/MMDS)	Based on WTB reports and actual FY 2011 payment units.
L.MDS	Based on WTB reports and actual FY 2011 payment units.

Cable Television Relay Service ("CARS") Stations	Based on data from Media Bureau's COALS database and actual FY 2011 payment units.
Cable Television System Subscribers	Based on publicly available data sources for estimated subscriber counts and actual FY 2011 payment units.
Interstate Telecommunication Service Providers	The Wireline Competition Bureau projected amount of calendar year 2011 revenues that will be reported on 2012 FCC Form 499-A worksheets due in April, 2012. Some of the projections are based on FCC Form 499-Q data for the four quarters of calendar year 2011.
Earth Stations	Based on International Bureau ("IB") licensing data and actual FY 2011 payment units.
Space Stations (GSOs & NGSOs)	Based on IB data reports and actual FY 2011 payment units.
International Bearer Circuits	Based on IB reports and submissions by licensees.
Submarine Cable Licenses	Based on IB license information.

ATTACHMENT E

**Factors, Measurements, and Calculations That Determine Station
Signal Contours and Associated Population Coverages****AM Stations**

For stations with nondirectional daytime antennas, the theoretical radiation was used at all azimuths. For stations with directional daytime antennas, specific information on each day tower, including field ratio, phasing, spacing and orientation was retrieved, as well as the theoretical pattern root-mean-square of the radiation in all directions in the horizontal plane ("RMS") figure milliVolt per meter (mV/m) @ 1 km for the antenna system. The standard, or modified standard if pertinent, horizontal plane radiation pattern was calculated using techniques and methods specified in §§73.150 and 73.152 of the Commission's Rules.⁴³ Radiation values were calculated for each of 360 radials around the transmitter site. Next, estimated soil conductivity data was retrieved from a database representing the information in FCC Figure R3.⁴⁴ Using the calculated horizontal radiation values, and the retrieved soil conductivity data, the distance to the principal community (5 mV/m) contour was predicted for each of the 360 radials. The resulting distance to principal community contours was used to form a geographical polygon. Population counting was accomplished by determining which 2010 block centroids were contained in the polygon. (A block centroid is the center point of a small area containing population as computed by the U.S. Census Bureau.) The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

FM Stations

The greater of the horizontal or vertical effective radiated power ("ERP") (kW) and respective height above average terrain ("HAAT") (m) combination was used. Where the antenna height above mean sea level ("HMSL") was available, it was used in lieu of the average HAAT figure to calculate specific HAAT figures for each of 360 radials under study. Any available directional pattern information was applied as well, to produce a radial-specific ERP figure. The HAAT and ERP figures were used in conjunction with the Field Strength (50-50) propagation curves specified in 47 C.F.R. §73.313 of the Commission's Rules to predict the distance to the principal community (70 dBu (decibel above 1 microVolt per meter) or 3.17 mV/m) contour for each of the 360 radials.⁴⁵ The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2010 block centroids were contained in the polygon. The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

⁴³ 47 C.F.R. §§ 73.150 and 73.152.

⁴⁴ See Map of Estimated Effective Ground Conductivity in the United States, 47 C.F.R. § 73.190 Figure R3.

⁴⁵ 47 C.F.R. § 73.313

ATTACHMENT F

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act ("RFA"),¹ the Commission prepared an Initial Regulatory Flexibility Analysis ("IRFA") in its *Notice of Proposed Rulemaking* (NPRM) to determine the possible economic impact on small entities by the policies and rules proposed in its NPRM. Written public comments were sought on the FY 2012 fee proposal, including on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.²

I. Need for, and Objectives of, the Report and Order:

2. This rulemaking proceeding was initiated by the Commission to revise its Schedule of Regulatory Fees to collect \$339,844,000, the amount that Congress has required the Commission to recover in regulatory fees. This Report and Order revises the fee rates in its Schedule of Regulatory Fees to reflect changes in estimated unit counts, if any, and the amount required by the Commission to collect in regulatory fees. Pursuant to rules adopted in this Order, the FCC will collect these fees in September 2012 in a manner that is efficient (e.g. using the Commission's various electronic filing and payment systems) and without undue public burden (less reliability on paper transactions and more reliability on pre-loaded payment data).

3. Section 9(a)(1) of the Communications Act of 1934, as amended (the "Act") directs the Commission to collect regulatory fees "to recover the costs of ...enforcement activities, policy and rulemaking activities, user information services, and international activities."³ Section 9(a)(2) stipulates that regulatory fees for the enumerated activities "shall be collected only if, and only in the total amounts, required in Appropriation Acts," and must "be established in amounts that will result in collection, during each fiscal year, of any amount that can be reasonably be expected to equal the amount appropriated" for the performance of the activities enumerated in section 9(a)(1) during that fiscal year. In this annual regulatory fee proceeding, we retain many of the current methods, policies, and procedures for collecting section 9 regulatory fees adopted by the Commission in prior years. Consistent with our established practice, we intend to collect these regulatory fees during a September 2012 filing window in order to collect the required amount by the end of our fiscal year.⁴

4. In this *FY 2012 Report and Order*, we address the following issues: 1) incorporating 2010 Census data into our broadcast population data, 2) assessing a regulatory fee for each broadcasting facility operating either in an analog or digital mode (but not both) for Low Power, Class A, and TV Translators/Boosters, 3) maintaining the FY 2012 Interstate Telecommunications Service Provider (ITSP) fee rate at the same level as in FY 2011, 4) using an online filing system for the filing of requests for a refund, waiver, fee reduction, or deferment of payment of an application or regulatory fee, and 5) maintaining the Commercial Mobile Radio Service ("CMRS") Messaging Service at the rate of

¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

² 5 U.S.C. § 604.

³ 47 U.S.C. § 159(a).

⁴ The Commission also expects to release in the near future a *Notice of Proposed Rulemaking* that will propose to update our current cost allocation percentages and revise our cost allocation methodology. We expect to implement any changes that result from this rulemaking in FY 2013; they do not affect the fees set in this *FY 2012 Report and Order*.

\$0.08 per subscriber.

- Regulatory Fee Obligations for AM and FM Radio Stations: The fee methodology for AM and FM radio stations is based on a number of factors, including facility attributes (e.g. power, channel/frequency) and the population served by each station. The calculation of the population served is determined by applying current United States Census Bureau data to the station's technical and engineering data, as detailed in Attachment E of this Report and Order. In FY 2012, the Commission will incorporate the results of the 2010 Census data into our broadcast population data, which could precipitate a change in population count for some radio stations. These population counts, along with the station's class and type of service, are the basis for determining regulatory fees.
- Regulatory Fee Obligations for Digital Low Power, Class A, and TV Translators/Boosters: The digital transition to full-service television stations was completed on June 12, 2009, but Low Power, Class A, and TV Translators/Boosters are not required to make the digital transition until September 1, 2015. Historically, we have only considered the digital transition in the context of regulatory fees applicable to full-service television stations. Consequently, the "digital only" exemption does not apply to Low Power, Class A, and TV Translator/Booster facilities. Because the digital transition in the Low Power, Class A, and TV Translator/Booster facilities is still voluntary, these facilities may transition from analog to digital service at varying times prior to September 1, 2015. During this period of transition, licensees of Low Power, Class A, and TV Translator/Booster facilities may be operating in analog mode, in digital mode, or in an analog and digital simulcast mode. In the absence of receiving any comments, we conclude that a single fee will be assessed for each facility regardless of whether it transmits in analog or digital mode, digital mode, or simulcasting in both analog and digital modes. As more of these facilities convert to digital mode, the Commission will revisit how regulatory fees will be assessed.
- Regulatory Fee Obligations of Interstate Telecommunications Service Providers (ITSP): In our *FY 2011 Report and Order*, we assessed the Interstate Telecommunications Service Provider ("ITSP") industry a regulatory fee of \$.00375 per revenue dollar. This fee reflected the Commission's decision to limit the increase in ITSP regulatory fees in light of the continuing decrease in the revenue base upon which ITSP regulatory fees are calculated, and pending a more comprehensive rebalancing of ITSP fees as part of our reexamination of the factual and methodological predicates of our regulatory fee program. This reexamination will commence shortly. In our *FY 2012 Notice of Proposed Rulemaking*, we proposed to assess FY 2012 ITSP regulatory fees at the same fee rate as in FY 2011, and to allocate the remaining revenue requirement across all other fee categories.⁵ We received one comment in support of our proposal. Because we will initiate a separate proceeding in the near future to examine these and other issues and expect to utilize any new data or methodologies adopted in setting next year's regulatory fees, we conclude that in the interim the FY 2012 ITSP fee rate should be maintained at the FY 2011 rate of .00375.
- Improving Public Information on Waiver Requests and Decisions: In our *FY 2012 Notice of Proposed Rulemaking*, we sought comment on requiring regulatees filing a request for a refund, waiver, fee reduction, or deferment of payment of an application or regulatory fee to use an online filing system rather than submitting their requests in hardcopy.

⁵ See *FY 2012 Regulatory Fees NPRM*, at para. 17.

format.⁶ We believe that an online filing system will complement other existing online Commission systems already in place, such as the Broadcast Radio and Television Electronic Filing System (more commonly referred to as CDBS), the Cable Operations and Licensing System (COALS), and Consumer Complaint Forms. The resulting fee waiver filing system will include such documents as the filed request, any relevant supporting documentation, and the resulting decision. We also proposed to apply the provisions of section 0.459 to requests that electronically-filed material be withheld from public inspection.⁷ We received no comments on this issue. We therefore adopt our proposal and require that all requests for refunds, waivers, fee reductions, or deferments of payment be filed using an online system. We direct the Office of Managing Director to take the necessary steps to assist regulatees in transitioning to electronic filing.

- Commercial Mobile Radio Services ("CMRS") Messaging Services: In our *FY 2012 Notice of Proposed Rulemaking*, the Commission proposed to maintain the CMRS Messaging fee rate at \$.08 per subscriber. We received one comment in support of our action. Because the prevailing circumstances that first initiated our action in FY 2003⁸ still exists today, we find it appropriate that the FY 2012 CMRS Messaging regulatory fee remain at a rate of \$.08 per subscriber.
- Administrative and Operational Issues: In FY 2009, we instituted a mandatory filing requirement using the Commission's electronic filing and payment system (also known as "Fee Filer").⁹ Regulatees filing their annual regulatory fee payments were required to begin the process by entering the Commission's Fee Filer system with a valid FCC Registration Number ("FRN") and password.¹⁰ This change, which required regulatees to use Fee Filer for the *filing* of annual regulatory fees, not the *payment* of such regulatory fees¹¹ was beneficial to both licensees and to the Commission. For licensees, the mandatory use of Fee Filer eliminates the need to manually complete and submit a hardcopy Form 159, and for the Commission, the data in electronic format makes it much easier to process payments efficiently and effectively. We received no specific comment to our general inquiry. Accordingly, the Commission will continue its efforts to promote greater efficiency in its regulatory fee notification and collection processes, subject to appropriate notice and comment.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

5. No parties have raised issues in response to the IRFA.

⁶ See *FY 2012 Regulatory Fees NPRM* at para. 18.

⁷ Specifically, section 0.457(a) (2) through (g) describe, *inter alia*, how confidential material should be submitted electronically, what showings must be made to justify withholding electronically-submitted information from public inspection, and how the Commission will resolve confidentiality requests.

⁸ Beginning in FY 2003, the Commission maintained the paging regulatory fee rate at \$.08 per subscriber, the same level as in FY 2002, and it has maintained this level of \$.08 per subscriber for all subsequent years. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003, Report and Order*, 18 FCC Rcd 15988 ¶¶ 21-22 (2003) (*FY 2003 Report and Order*).

⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year FY 2009, Report and Order* 24 FCC Rcd 10301 at paras. 20 and 21 (*FY 2009 Report and Order*).

¹⁰ In order to do this, licensees must have a current and valid FRN address on file in the Commission's Registration System (CORES).

¹¹ Regulatees have different options when making a payment, including credit card, check, and wire transfer.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.¹² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁵

7. **Small Businesses.** Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.¹⁶

8. **Small Businesses, Small Organizations, and Small Governmental Jurisdictions.** Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.¹⁷ First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.¹⁸ In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹⁹ Nationwide, as of 2007, there were approximately 1,621,315 small organizations.²⁰ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²¹ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.²² We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”²³ Thus, we estimate that

¹² 5 U.S.C. § 603(b)(3).

¹³ 5 U.S.C. § 601(6).

¹⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁵ 15 U.S.C. § 632.

¹⁶ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (accessed Jan. 2009).

¹⁷ See 5 U.S.C. §§ 601(3)–(6).

¹⁸ See SBA, Office of Advocacy, “Frequently Asked Questions,” web.sba.gov/faqs (last visited May 6, 2011; figures are from 2009).

¹⁹ 5 U.S.C. § 601(4).

²⁰ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

²¹ 5 U.S.C. § 601(5).

²² U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007)

²³ The 2007 U.S. Census data for small governmental organizations indicate that there were 89,476 “Local Governments” in 2007. (U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428.) The criterion by which the size of such local governments is determined to be small is a population of 50,000. However, since the Census Bureau does not specifically apply that criterion, it cannot be determined with precision how many of such local governmental organizations is small. Nonetheless, the inference seems reasonable that substantial number of these governmental organizations has a population of less than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census’s Statistical Abstract of the U.S., that (continued....)

most governmental jurisdictions are small.

9. **Incumbent Local Exchange Carriers (Incumbent LECs).** Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁴ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.²⁵ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.²⁶ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the *NPRM*. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small providers.²⁷

10. **Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁸ Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.²⁹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.³⁰ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.³¹ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.³² In

(Continued from previous page)

inference is further supported by the fact that in both Tables, many entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of 50,000 many specific sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority is small. 23 13 C.F.R. § 121.201, NAICS code 517110.

²⁵ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) ("*Trends in Telephone Service*").

²⁶ See *id.*

²⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-_ids_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁸ 13 C.F.R. § 121.201, NAICS code 517110.

²⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-_ids_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

³⁰ See *Trends in Telephone Service*, at tbl. 5.3.

³¹ *Id.*

³² *Id.*

addition, 72 carriers have reported that they are Other Local Service Providers.³³ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.³⁴ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the NPRM.

11. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁵ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.³⁶ Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.³⁷ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.³⁸ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

12. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁹ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1,000 employees and one operated with more than 1,000.⁴⁰ Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data,⁴¹ 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

13. **Payphone Service Providers (PSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴² Census Bureau data for 2007 shows that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these PSPs can be

³³ *Id.*

³⁴ *Id.*

³⁵ 13 C.F.R. § 121.201, NAICS code 517911.

³⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

³⁷ *See Trends in Telephone Service*, at tbl. 5.3.

³⁸ *Id.*

³⁹ 13 C.F.R. § 121.201, NAICS code 517911.

⁴⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁴¹ *Trends in Telephone Service*, at tbl. 5.3.

⁴² 13 C.F.R. § 121.201, NAICS code 517110.

considered small entities.⁴³ According to Commission data,⁴⁴ 657 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 653 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

14. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁵ Census Bureau data for 2007 shows that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.⁴⁶ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.⁴⁷ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.⁴⁸ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the NPRM.

15. **Operator Service Providers (OSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁹ Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.⁵⁰ According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.⁵¹ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

16. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵² Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than

⁴³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁴⁴ *Trends in Telephone Service*, at tbl. 5.3.

⁴⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁴⁷ See *Trends in Telephone Service*, at tbl. 5.3.

⁴⁸ *Id.*

⁴⁹ 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁵¹ *Trends in Telephone Service*, at tbl. 5.3.

⁵² 13 C.F.R. § 121.201, NAICS code 517911.

1000 employees and one operated with more than 1,000.⁵³ Thus under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.⁵⁴ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.⁵⁵ Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Notice.

17. **800 and 800-Like Service Subscribers.**⁵⁶ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (“toll free”) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵⁷ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.⁵⁸ Thus under this category and the associated small business size standard, the majority of resellers in this classification can be considered small entities. To focus specifically on the number of subscribers than on those firms which make subscription service available, the most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.⁵⁹ According to our data for September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,888,687; the number of 877 numbers assigned was 4, 721,866; and the number of 866 numbers assigned was 7, 867,736. The Commission does not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, the Commission estimates that there are 7,860,000 or fewer small entity 800 subscribers; 5,888,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

18. **Satellite Telecommunications Providers.** Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.⁶⁰ The second has a size standard of \$25 million or less in annual receipts.⁶¹

19. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”⁶² Census Bureau data for 2007 show that 512 Satellite

⁵³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁴ See *Trends in Telephone Service*, at tbl. 5.3.

⁵⁵ *Id.*

⁵⁶ We include all toll-free number subscribers in this category, including those for 888 numbers.

⁵⁷ 13 C.F.R. § 121.201, NAICS code 517911.

⁵⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁹ *Trends in Telephone Service*, at tbls. 18.4, 18.5, 18.6, 18.7.

⁶⁰ 13 C.F.R. § 121.201, NAICS code 517410.

⁶¹ 13 C.F.R. § 121.201, NAICS code 517919.

⁶² U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

Telecommunications firms that operated for that entire year.⁶³ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.⁶⁴ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

20. The second category, i.e. "All Other Telecommunications" comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."⁶⁵ For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.⁶⁶ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49,999,999.⁶⁷ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

21. **Wireless Telecommunications Carriers (except satellite).** This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.⁶⁸ The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers. The size standard for that category is that a business is small if it has 1,500 or fewer employees.⁶⁹ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁷⁰ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.⁷¹ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁷² Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers(except satellite) are small entities that may be affected by our

⁶³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶⁴ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶⁵ <http://www.census.gov/cgi-bin/sssd/naics/naicsrhl?code=517919&search=2007%20NAICS%20Search>.

⁶⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁶⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrhl?code=517210&search=2007%20NAICS%20Search>

⁶⁹ 13 C.F.R. § 121.201, NAICS code 517210.

⁷⁰ 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁷¹ U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

⁷² *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees: the largest category provided is for firms with "100 employees or more."

proposed action.⁷³

22. **Licenses Assigned by Auctions.** Initially, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

23. **Paging Services.** Neither the SBA nor the FCC has developed a definition applicable exclusively to paging services. However, a variety of paging services is now categorized under Wireless Telecommunications Carriers (except satellite).⁷⁴ This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. Illustrative examples in the paging context include paging services, except satellite; two-way paging communications carriers, except satellite; and radio paging services communications carriers. The SBA has deemed a paging service in this category to be small if it has 1,500 or fewer employees.⁷⁵ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.⁷⁶ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁷⁷ Thus under this category and the associated small business size standard, the Commission estimates that the majority of paging services in the category of wireless telecommunications carriers(except satellite) are small entities that may be affected by our proposed action.⁷⁸

24. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits.⁷⁹ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁸⁰ The SBA has approved this definition.⁸¹ An initial auction of Metropolitan Economic Area (“MEA”) licenses was

⁷³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

⁷⁴ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”: <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>

⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”

⁷⁶ U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

⁷⁷ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

⁷⁸ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

⁷⁹ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Red 2732, 2811-2812, paras. 178-181 (“*Paging Second Report and Order*”); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Red 10030, 10085-10088, ¶¶ 98-107 (1999).

⁸⁰ *Paging Second Report and Order*, 12 FCC Red at 2811, ¶ 179.

⁸¹ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (“WTB”), FCC (Dec. 2, 1998) (“*Alvarez Letter 1998*”).

conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.⁸² Fifty-seven companies claiming small business status won 440 licenses.⁸³ A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁸⁴ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁸⁵ A fourth auction of 9,603 lower and upper band paging licenses was held in the year 2010. 29 bidders claiming small or very small business status won 3,016 licenses.

25. **2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services ("WCS") auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years.⁸⁶ The SBA approved these definitions.⁸⁷ The Commission conducted an auction of geographic area licenses in the WCS service in 1997. In the auction, seven bidders that qualified as very small business entities won 31 licenses, and one bidder that qualified as a small business entity won a license.

26. **1670-1675 MHz Services.** This service can be used for fixed and mobile uses, except aeronautical mobile.⁸⁸ An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a "small business" as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years, which would thus be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a "very small business" as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years, which would thus be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. The winning bidder was not a small entity.

27. **Wireless Telephony.** Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁸⁹ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁹⁰ Census data for 2007 shows that there were 1,383 firms that operated that year.⁹¹ Of those 1,383, 1,368

⁸² See "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁸³ See *id.*

⁸⁴ See "Lower and Upper Paging Band Auction Closes," Public Notice, 16 FCC Rcd 21821 (WTB 2002).

⁸⁵ See "Lower and Upper Paging Bands Auction Closes," Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

⁸⁶ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

⁸⁷ See *Alvarez Letter 1998*.

⁸⁸ 47 C.F.R. § 2.106; see generally 47 C.F.R. §§ 27.1–.70.

⁸⁹ 13 C.F.R. § 121.201, NAICS code 517210.

⁹⁰ *Id.*

⁹¹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&- (continued....)

had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.⁹² Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.⁹³ Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.⁹⁴ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁹⁵ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

28. Broadband Personal Communications Service. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous years.⁹⁶ For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three years.⁹⁷ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁹⁸ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small and very small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.⁹⁹ On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁰⁰ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

29. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small

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⁹² *Trends in Telephone Service*, at tbl. 5.3.

⁹³ *Id.*

⁹⁴ *See Trends in Telephone Service*, at tbl. 5.3.

⁹⁵ *See id.*

⁹⁶ *See Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314. Report and Order, 11 FCC Red 7824, 7850-52 ¶¶ 57-60 (1996) ("PCS Report and Order"); *see also* 47 C.F.R. § 24.720(b).

⁹⁷ *See PCS Report and Order*, 11 FCC Red at 7852 ¶ 60.

⁹⁸ *See Alvarez Letter 1998*.

⁹⁹ *See Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁰⁰ *See C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Red 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, W1 Docket No. 97-82, Fourth Report and Order, 13 FCC Red 15743, 15768 ¶ 46 (1998).

business status.¹⁰¹ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.¹⁰² On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁰³ Of the 14 winning bidders in that auction, six claimed small business status and won 18 licenses.¹⁰⁴ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.¹⁰⁵ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁰⁶

30. **Advanced Wireless Services.** In 2006, the Commission conducted its first auction of Advanced Wireless Services licenses in the 1710-1755 MHz and 2110-2155 MHz bands ("AWS-1"), designated as Auction 66.¹⁰⁷ For the AWS-1 bands, the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁰⁸ In 2006, the Commission conducted its first auction of AWS-1 licenses.¹⁰⁹ In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses won 142 licenses.¹¹⁰ Twenty-six of the winning bidders identified themselves as small businesses and won 73 licenses.¹¹¹ In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.¹¹² Four winning bidders identified themselves as very small businesses, and three of the winning bidders identifying

¹⁰¹ See *C and F Block Broadband PCS Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

¹⁰² See *Broadband PCS Spectrum Auction Closes: Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁰³ See *Auction of Broadband PCS Spectrum Licenses Closes: Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁰⁴ *Id.*

¹⁰⁵ See *Auction of AWS-1 and Broadband PCS Licenses Closes: Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁰⁶ *Id.*

¹⁰⁷ See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006: Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Rcd 4562 (2006) ("*Auction 66 Procedures Public Notice*");

¹⁰⁸ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25,162, App. B (2003), *modified by* *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

¹⁰⁹ See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006: Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Rcd 4562 (2006) ("*Auction 66 Procedures Public Notice*").

¹¹⁰ See *Auction of Advanced Wireless Services Licenses Closes: Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Rcd 10,521 (2006) ("*Auction 66 Closing Public Notice*").

¹¹¹ *See id.*

¹¹² See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

themselves as a small businesses won five AWS-I licenses.¹¹³

31. **Narrowband Personal Communications Services.** In 1994, the Commission conducted two auctions of Narrowband PCS licenses. For these auctions, the Commission defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million.¹¹⁴ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.¹¹⁵ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹¹⁶ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.¹¹⁷ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.¹¹⁸ The SBA has approved these small business size standards.¹¹⁹ A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.¹²⁰ Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

32. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹²¹ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹²² A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.¹²³ Additionally, the Lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (“MSA/RSA”) licenses — “entrepreneur” — which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues

¹¹³ See *Auction of AWS-I and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period*, Public Notice, 23 FCC Red 12,749 (2008).

¹¹⁴ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Red 175, 196, para. 46 (1994).

¹¹⁵ See “Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses, Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

¹¹⁶ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Red 10456, 10476, para. 40 (2000) (“*Narrowband PCS Second Report and Order*”).

¹¹⁷ *Narrowband PCS Second Report and Order*, 15 FCC Red at 10476, para. 40.

¹¹⁸ *Id.*

¹¹⁹ See *Alvarez Letter 1998*.

¹²⁰ See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Red 18663 (WTB 2001).

¹²¹ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Red 1022 (2002) (“*Channels 52-59 Report and Order*”).

¹²² See *Channels 52-59 Report and Order*, 17 FCC Red at 1087-88, ¶ 172.

¹²³ See *id.*

that are not more than \$3 million for the preceding three years.¹²⁴ The SBA approved these small size standards.¹²⁵ An auction of 740 licenses was conducted in 2002 (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.¹²⁶ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.¹²⁷ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.¹²⁸ In 2005, the Commission completed an auction of 5 licenses in the lower 700 MHz band (Auction 60). All three winning bidders claimed small business status.

33. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.¹²⁹ An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.¹³⁰ Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.

34. **Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.¹³¹ On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.¹³² The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

¹²⁴ See *id.* 17 FCC Red at 1088, ¶ 173.

¹²⁵ See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) ("*Alvarez Letter 1999*").

¹²⁶ See "Lower 700 MHz Band Auction Closes," *Public Notice*, 17 FCC Red 17272 (WTB 2002).

¹²⁷ See Lower 700 MHz Band Auction Closes, *Public Notice*, 18 FCC Red 11873 (WTB 2003).

¹²⁸ See *id.*

¹²⁹ Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephone, WT Docket No. 01-309, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket No. 03-264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 06-169, *Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Red 15289 (2007) ("*700 MHz Second Report and Order*").

¹³⁰ See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Red 4572 (WTB 2008).

¹³¹ *700 MHz Second Report and Order*, 22 FCC Red 15289.

¹³² See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Red 4572 (WTB 2008).

35. **700 MHz Guard Band Licenses.** In 2000, the Commission adopted the *700 MHz Guard Band Report and Order*, in which it established rules for the A and B block licenses in the Upper 700 MHz band, including size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits.¹³³ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹³⁴ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.¹³⁵ SBA approval of these definitions is not required.¹³⁶ An auction of these licenses was conducted in 2000.¹³⁷ Of the 104 licenses auctioned, 96 licenses were won by nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses was held in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.¹³⁸

36. **Specialized Mobile Radio.** The Commission adopted small business size standards for the purpose of determining eligibility for bidding credits in auctions of Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands. The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹³⁹ The Commission defined a “very small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$3 million for the preceding three years.¹⁴⁰ The SBA has approved these small business size standards for both the 800 MHz and 900 MHz SMR Service.¹⁴¹ The first 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 licenses in the 900 MHz SMR band. In 2004, the Commission held a second auction of 900 MHz SMR licenses and three winning bidders identifying themselves as very small businesses won 7 licenses.¹⁴² The auction of 800 MHz SMR licenses for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small or very small businesses under the \$15 million size standard won 38 licenses for the upper 200 channels.¹⁴³ A second auction of 800 MHz SMR licenses was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business

¹³³ See *Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (“*700 MHz Guard Band Report and Order*”).

¹³⁴ See *700 MHz Guard Band Report and Order*, 15 FCC Rcd at 5343, para. 108.

¹³⁵ See *id.*

¹³⁶ See *id.*, 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

¹³⁷ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (2000).

¹³⁸ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

¹³⁹ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

¹⁴⁰ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

¹⁴¹ See *Alvarez Letter 1999*.

¹⁴² See 900 MHz Specialized Mobile Radio Service Spectrum Auction Closes: Winning Bidders Announced,” *Public Notice*, 19 FCC Rcd. 3921 (WTB 2004).

¹⁴³ See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

status won five licenses.¹⁴⁴

37. The auction of the 1,053 800 MHz SMR licenses for the General Category channels was conducted in 2000. Eleven bidders who won 108 licenses for the General Category channels in the 800 MHz SMR band qualified as small or very small businesses.¹⁴⁵ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.¹⁴⁶ Of the 22 winning bidders, 19 claimed small or very small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed to be small businesses.

38. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues not exceeding \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.¹⁴⁷ We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

39. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁴⁸ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹⁴⁹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

40. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service licenses are assigned by auction, where mutually exclusive applications are accepted. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹⁵⁰ This small business standard

¹⁴⁴ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

¹⁴⁵ See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (2000).

¹⁴⁶ See, “800 MHz SMR Service Lower 80 Channels Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (2000).

¹⁴⁷ See generally 13 C.F.R. § 121.201, NAICS code 517210.

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

¹⁴⁹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSS/5&-_lang=en.

¹⁵⁰ *Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁵¹ A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.¹⁵² The SBA has approved these small size standards.¹⁵³ Auctions of Phase II licenses commenced on and closed in 1998.¹⁵⁴ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.¹⁵⁵ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.¹⁵⁶ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.¹⁵⁷ In 2007, the Commission conducted a fourth auction of the 220 MHz licenses, designated as Auction 72.¹⁵⁸ Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.¹⁵⁹ In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

41. **Private Land Mobile Radio ("PLMR").** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.¹⁶⁰ The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.¹⁶¹

¹⁵¹ *Id.* at 11068 ¶ 291.

¹⁵² *Id.*

¹⁵³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

¹⁵⁴ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

¹⁵⁵ See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

¹⁵⁶ See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

¹⁵⁷ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

¹⁵⁸ See "Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72, *Public Notice*, 22 FCC Rcd 3404 (2007).

¹⁵⁹ See *Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period*, Public Notice, 22 FCC Rcd 11573 (2007).

¹⁶⁰ See 13 C.F.R. § 121.201, NAICS code 517210.

¹⁶¹ See generally 13 C.F.R. § 121.201.

42. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

43. **Fixed Microwave Services.** Microwave services include common carrier,¹⁶² private-operational fixed,¹⁶³ and broadcast auxiliary radio services.¹⁶⁴ They also include the Local Multipoint Distribution Service ("LMDS"),¹⁶⁵ the Digital Electronic Message Service ("DEMS"),¹⁶⁶ and the 24 GHz Service,¹⁶⁷ where licensees can choose between common carrier and non-common carrier status.¹⁶⁸ The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.¹⁶⁹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁷⁰ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

44. **39 GHz Service.** The Commission adopted small business size standards for 39 GHz licenses. A "small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million in the preceding three years.¹⁷¹ A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues of not more than \$15 million for the preceding three years.¹⁷² The SBA has approved these small business size standards.¹⁷³ In 2000, the Commission conducted an auction of 2,173

¹⁶² See 47 C.F.R. Part 101, Subparts C and I.

¹⁶³ See *id.* Subparts C and II.

¹⁶⁴ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

¹⁶⁵ See 47 C.F.R. Part 101, Subpart I.

¹⁶⁶ See *id.* Subpart G.

¹⁶⁷ See *id.*

¹⁶⁸ See 47 C.F.R. §§ 101.533, 101.1017.

¹⁶⁹ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁷⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁷¹ See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Rcd 18600 (1997).

¹⁷² *Id.*

¹⁷³ See Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); see Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

39 GHz licenses. A total of 18 bidders who claimed small or very small business status won 849 licenses.

45. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.¹⁷⁴ The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous years.¹⁷⁵ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three years.¹⁷⁶ The SBA has approved these small business size standards in the context of LMDS auctions.¹⁷⁷ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

46. **218-219 MHz Service.** The first auction of 218-219 MHz Service (previously referred to as the Interactive and Video Data Service or IVDS) licenses resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas ("MSAs").¹⁷⁸ Of the 594 licenses, 557 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.¹⁷⁹ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, the Commission revised its small business size standards for the 218-219 MHz Service and defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.¹⁸⁰ The Commission defined a "very small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.¹⁸¹ The SBA has approved these definitions.¹⁸²

47. **Location and Monitoring Service ("LMS").** Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For auctions of LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁸³ A "very small business" is defined as an entity that, together with controlling interests and

¹⁷⁴ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) ("LMDS Second Report and Order").

¹⁷⁵ See *LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

¹⁷⁶ See *id.*

¹⁷⁷ See *Alvarez to Phythyon Letter 1998*.

¹⁷⁸ See *"Interactive Video and Data Service (IVDS) Applications Accepted for Filing,"* Public Notice, 9 FCC Rcd 6227 (1994).

¹⁷⁹ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

¹⁸⁰ *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

¹⁸¹ *Id.*

¹⁸² See *Alvarez to Phythyon Letter 1998*.

¹⁸³ *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring* (continued....)

affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million.¹⁸⁴ These definitions have been approved by the SBA.¹⁸⁵ An auction of LMS licenses was conducted in 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

48. **Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.¹⁸⁶ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").¹⁸⁷ For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.¹⁸⁸ Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁸⁹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

49. **Air-Ground Radiotelephone Service.**¹⁹⁰ The Commission has previously used the SBA's small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.¹⁹¹ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.¹⁹² A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁹³ These definitions were approved by the SBA.¹⁹⁴ In 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction 65). The auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

(Continued from previous page)

Systems, Second Report and Order, 13 FCC Red 15182, 15192, ¶ 20 (1998) ("*Automatic Vehicle Monitoring Systems Second Report and Order*"); *see also* 47 C.F.R. § 90.1103.

¹⁸⁴ *Automatic Vehicle Monitoring Systems Second Report and Order*, 13 FCC Red at 15192, para. 20; *see also* 47 C.F.R. § 90.1103.

¹⁸⁵ *See Alvarez Letter 1998*.

¹⁸⁶ The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

¹⁸⁷ BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

¹⁸⁸ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸⁹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSZ5&-_lang=en.

¹⁹⁰ The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

¹⁹¹ 13 C.F.R. § 121.201, NAICS codes 517210.

¹⁹² *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103 and 05-42, Order on Reconsideration and Report and Order, 20 FCC Red 19663, ¶¶ 28-42 (2005).

¹⁹³ *Id.*

¹⁹⁴ *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

50. **Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency ("VHF") marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.¹⁹⁵ Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁹⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

51. **Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.¹⁹⁷ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard,¹⁹⁸ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁹⁹ Census data for 2007 shows that there were 1,383 firms that operated that year.²⁰⁰ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

52. **Multiple Address Systems ("MAS").** Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. The Commission defines a small business for MAS licenses as an entity that has average gross revenues of less than \$15 million in the preceding three years.²⁰¹ A very small business is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three years.²⁰² The SBA has approved these definitions.²⁰³ The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of March 5, 2010, there were over 11,500 MAS station authorizations. In 2001, an auction of 5,104 MAS licenses in 176 EAs was conducted.²⁰⁴ Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS

¹⁹⁵ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁹⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ids_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁹⁷ This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

¹⁹⁸ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁹⁹ *Id.*

²⁰⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ids_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁰¹ See *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008, ¶ 123 (2000).

²⁰² *Id.*

²⁰³ See *Alvarez Letter 1999*.

²⁰⁴ See "Multiple Address Systems Spectrum Auction Closes," Public Notice, 16 FCC Rcd 21011 (2001).

licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

53. With respect to entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.²⁰⁵ The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

54. **1.4 GHz Band Licensees.** The Commission conducted an auction of 64 1.4 GHz band licenses in the paired 1392-1395 MHz and 1432-1435 MHz bands, and in the unpaired 1390-1392 MHz band in 2007.²⁰⁶ For these licenses, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, had average gross revenues not exceeding \$40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years.²⁰⁷ Neither of the two winning bidders claimed small business status.²⁰⁸

55. **Incumbent 24 GHz Licensees.** This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²⁰⁹ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²¹⁰ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent²¹¹ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

²⁰⁵ See 13 C.F.R. § 121.201, NAICS code 517210.

²⁰⁶ See "Auction of 1.4 GHz Band Licenses Scheduled for February 7, 2007," Public Notice, 21 FCC Rcd 12393 (WTB 2006); "Auction of 1.4 GHz Band Licenses Closes; Winning Bidders Announced for Auction No. 69," Public Notice, 22 FCC Rcd 4714 (2007) ("Auction No. 69 Closing PN").

²⁰⁷ Auction No. 69 Closing PN, Attachment C.

²⁰⁸ See Auction No. 69 Closing PN.

²⁰⁹ 13 C.F.R. § 121.201, NAICS code 517210.

²¹⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

²¹¹ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

56. **Future 24 GHz Licensees.** With respect to new applicants for licenses in the 24 GHz band, for the purpose of determining eligibility for bidding credits, the Commission established three small business definitions. An “entrepreneur” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$40 million.²¹² A “small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.²¹³ A “very small business” in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²¹⁴ The SBA has approved these small business size standards.²¹⁵ In a 2004 auction of 24 GHz licenses, three winning bidders won seven licenses.²¹⁶ Two of the winning bidders were very small businesses that won five licenses.

57. **Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”).²¹⁷ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three years.²¹⁸ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.²¹⁹ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission

²¹² *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 ¶ 77 (2000) (“24 GHz Report and Order”); see also 47 C.F.R. § 101.538(a)(3).

²¹³ *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(2).

²¹⁴ *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(1).

²¹⁵ See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

²¹⁶ *Auction of 24 GHz Service Spectrum Auction Closes, Winning Bidders Announced for Auction 56, Down Payments Due August 16, 2004, Final Payments Due August 30, 2004, Ten-Day Petition to Deny Period*, Public Notice, 19 FCC Rcd 14738 (2004).

²¹⁷ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 ¶ 7 (1995).

²¹⁸ 47 C.F.R. § 21.961(b)(1).

²¹⁹ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

conducted Auction 86, the sale of 78 licenses in the BRS areas.²²⁰ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.²²¹ Auction 86 concluded in 2009 with the sale of 61 licenses.²²² Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

58. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²²³ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²²⁴ For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²²⁵ To gauge small business prevalence for these cable services we must, however, use the most current census data. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.²²⁶ Of this total, 939 firms employed 999 or fewer employees, and 16 firms employed 1,000 employees or more.²²⁷ Thus, the majority of these firms can be considered small.

59. **Television Broadcasting.** This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs

²²⁰ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

²²¹ *Id.* at 8296.

²²² *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

²²³ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

²²⁴ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²²⁵ 13 C.F.R. § 121.201, NAICS code 517210.

²²⁶ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued November 2010).

²²⁷ *Id.*

to the public.”²²⁸ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.²²⁹ The Commission has estimated the number of licensed commercial television stations to be 1,387.²³⁰ In addition, according to Commission staff review of the BIA Advisory Services, LLC’s *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.²³¹ We therefore estimate that the majority of commercial television broadcasters are small entities.

60. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations²³² must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

61. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.²³³ These stations are non-profit, and therefore considered to be small entities.²³⁴

62. In addition, there are also 2,528 low power television stations, including Class A stations (LPTV).²³⁵ Given the nature of these services, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

63. **Radio Broadcasting.** This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”²³⁶ The SBA has established a small business size standard for this category, which is: such firms having \$7 million or less in annual receipts.²³⁷ According to Commission staff review of BIA Advisory Services, LLC’s *Media Access Pro Radio Database* on March 28, 2012, about 10,759 (97%) of 11,102 commercial radio stations had revenues of \$7 million or less. Therefore, the majority of such entities are small entities.

²²⁸ U.S. Census Bureau, 2007 NAICS Definitions, “515120 Television Broadcasting” (partial definition): <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

²²⁹ 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2010).

²³⁰ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.pdf.

²³¹ We recognize that BIA’s estimate differs slightly from the FCC total given *supra*.

²³² “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

²³³ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

²³⁴ See generally 5 U.S.C. §§ 601(4), (6).

²³⁵ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

²³⁶ U.S. Census Bureau, 2007 NAICS Definitions, “515112 Radio Stations”;
<http://www.census.gov/naics/2007/def/ND515112.HTM#N515112>.

²³⁷ 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2010).

64. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.²³⁸ In addition, to be determined to be a "small business," the entity may not be dominant in its field of operation.²³⁹ We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

65. **Auxiliary, Special Broadcast and Other Program Distribution Services.** This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.²⁴⁰

66. The Commission estimates that there are approximately 6,099 FM translators and boosters.²⁴¹ The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (\$7.0 million for a radio station or \$14.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a "small business concern" because they are not independently owned and operated.²⁴²

67. **Cable Television Distribution Services.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²⁴³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴⁴ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

²³⁸ "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a)(1) (an SBA regulation).

²³⁹ 13 C.F.R. § 121.102(b) (an SBA regulation).

²⁴⁰ 13 C.F.R. 121.201, NAICS codes 515112 and 515120.

²⁴¹ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2011," dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

²⁴² See 15 U.S.C. § 632.

²⁴³ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), <http://www.census.gov/naics/2007/def/ND517110.H1M#N517110> (last visited Oct. 21, 2009).

²⁴⁴ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSS/5&-_lang=en.

68. **Cable Companies and Systems.** The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁴⁵ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁴⁶ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁴⁷ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²⁴⁸ Thus, under this second size standard, most cable systems are small.

69. **Cable System Operators.** The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁴⁹ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁵⁰ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁵¹ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁵² and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

70. **Open Video Systems.** Open Video Service (OVS) systems provide subscription services.²⁵³ The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.²⁵⁴ The OVS framework provides opportunities for the distribution of video programming other

²⁴⁵ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁴⁶ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁴⁷ 47 C.F.R. § 76.901(c).

²⁴⁸ Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

²⁴⁹ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁵⁰ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²⁵¹ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁵² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

²⁵³ See 47 U.S.C. § 573.

²⁵⁴ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

than through cable systems. Because OVS operators provide subscription services,²⁵⁵ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁵⁶ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.²⁵⁷ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁵⁸ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁵⁹ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.²⁶⁰ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

71. **Cable Television Relay Service.** The industry in which Cable Television Relay Services operate comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services: wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.²⁶¹ The category designated by the SBA for this industry is “Wired Telecommunications Carriers.”²⁶² The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, Census data for 2007 shows 3,188 firms in this

²⁵⁵ See 47 U.S.C. § 573.

²⁵⁶ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁵⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSZ/5&-_lang=en.

²⁵⁸ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/esovsccer.html>.

²⁵⁹ See *13th Annual Report*, 24 FCC Rcd at 606-07 ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁶⁰ See <http://www.fcc.gov/mb/ovs/esovsccer.html> (current as of February 2007).

²⁶¹ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition): <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁶² 13 C.F.R. § 121.201, NAICS code 517110.

category.²⁶³ Of these 3,188 firms, only 44 had 1,000 or more employees. While we could not find precise Census data on the number of firms with in the group with 1,500 or fewer employees, it is clear that at least 3,144 firms with fewer than 1,000 employees would be in that group. On this basis, the Commission estimates that a substantial majority of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category, are small.²⁶⁴

72. **Multichannel Video Distribution and Data Service.** MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defines a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.²⁶⁵ These definitions were approved by the SBA.²⁶⁶ On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.²⁶⁷ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.²⁶⁸

73. **Amateur Radio Service.** These licenses are held by individuals in a noncommercial capacity; these licensees are not small entities.

74. **Personal Radio Services.** Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.²⁶⁹ These services include Citizen Band Radio Service ("CB"), General Mobile Radio Service ("GMRS"), Radio Control Radio Service ("R/C"), Family Radio Service ("FRS"), Wireless Medical Telemetry Service ("WMTS"), Medical Implant Communications Service ("MICS"), Low Power Radio Service

²⁶³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-lang=en.

²⁶⁴ *Id.* As noted in para. 18 above with regard to the distinction between manufacturers of equipment used to provide interconnected VoIP and manufactures of equipment to provide non-interconnected VoIP, our estimates of the number of the number of providers of non-interconnected VoIP (and the number of small entities within that group) are likely overstated because we could not draw in the data a distinction between such providers and those that provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time.

²⁶⁵ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2-12.7 GHz Band.* ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Red 9614, 9711, ¶ 252 (2002).

²⁶⁶ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

²⁶⁷ See "Multichannel Video Distribution and Data Service Auction Closes," Public Notice, 19 FCC Red 1834 (2004).

²⁶⁸ See "Auction of Multichannel Video Distribution and Data Service Licenses Closes: Winning Bidders Announced for Auction No. 63," Public Notice, 20 FCC Red 19807 (2005).

²⁶⁹ 47 C.F.R. part 90.

("LPRS"), and Multi-Use Radio Service ("MURS").²⁷⁰ There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.²⁷¹ Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by our action.

75. **Public Safety Radio Services.** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.²⁷² There are a total of approximately 127,540 licensees in these services. Governmental entities²⁷³ as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.²⁷⁴

76. **Internet Service Providers.** *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business economic census categories. They are (1) Internet Publishing and Broadcasting and Web Search Portals,²⁷⁵ and (2) All Other Information Services.²⁷⁶

77. **Internet Service Providers.** The 2007 Economic Census places these firms,

²⁷⁰ The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of part 95 of the Commission's rules. See generally 47 C.F.R. part 95.

²⁷¹ 13 C.F.R. § 121.201, NAICS Code 517210.

²⁷² With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15-90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed for highway maintenance service to provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service ("EMRS") use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15-90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33-90.55.

²⁷³ 47 C.F.R. § 1.1162.

²⁷⁴ 5 U.S.C. § 601(5).

²⁷⁵ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

²⁷⁶ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.*, cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.*, dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,²⁷⁷ which has an SBA small business size standard of 1,500 or fewer employees.²⁷⁸ These are also labeled "broadband." The latter are within the category of All Other Telecommunications,²⁷⁹ which has a size standard of annual receipts of \$25 million or less.²⁸⁰ These are labeled non-broadband.

78. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.²⁸¹ For the second category, the data show that 1,682 firms operated for the entire year.²⁸² Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

79. **Internet Publishing and Broadcasting and Web Search Portals.** This industry comprises establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.²⁸³ The SBA deems businesses in this industry with 500 or fewer employees small.²⁸⁴ According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with to 999 employees.²⁸⁵ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

80. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. Most licensees will be required to count the number of licenses

²⁷⁷ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁷⁸ 13 C.F.R. § 121.201, NAICS code 517110.

²⁷⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

²⁸⁰ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

²⁸¹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5171103 (rel. Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1-4 employees and for 5-9 employees.

²⁸² U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

²⁸³ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

²⁸⁴ http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

²⁸⁵ http://factfinder.census.gov/servlet/IBQTTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

or call signs authorized, and pay a regulatory fee based on the number of licenses or call signs.²⁸⁶ In some instances, licensees or regulatees may decide to submit an FCC Form 159 Remittance Advice. Interstate telephone service providers must compute their annual regulatory fee based on their interstate and international end-user revenue using information they already supply to the Commission in compliance with the Form 499-A, Telecommunications Reporting Worksheet. Compliance with the fee schedule will require some regulatees to tabulate the number of units (*e.g.*, cellular telephones, pagers, cable TV subscribers) they have in service. Regulatees ordinarily will keep a list of the number of units they have in service as part of their normal business practices. No additional outside professional skills are required to submit a regulatory fee payment, and it can be completed by the employees responsible for an entity's business records.

81. As discussed previously in this *Report and Order*, the Commission concluded in its FY 2009 regulatory fee cycle that regulatees filing their annual regulatory fee payments must begin the process by entering the Commission's Fee Filer system with a valid FRN and password. In some instances, it will be necessary to use a specific FRN and password that is linked to a particular regulatory fee bill. Going forward, the submission of hardcopy Form 159 documents will not be permitted for making a regulatory fee payment during the regulatory fee cycle. By requiring regulatees to use Fee Filer to begin the regulatory fee payment process, errors resulting from illegible handwriting on hardcopy Form 159's will be reduced, and the Commission will be able to create an electronic record of regulatee payment attributes that are more easily traceable than payments that were previously mailed in with a hardcopy Form 159.

82. Licensees and regulatees are advised that failure to submit the required regulatory fee in a timely manner will subject the licensee or regulatee to a late payment penalty of 25 percent in addition to the required fee.²⁸⁷ If payment is not received, new or pending applications may be dismissed, and existing authorizations may be subject to rescission.²⁸⁸ Further, in accordance with the DCIA, federal agencies may bar a person or entity from obtaining a federal loan or loan insurance guarantee if that person or entity fails to pay a delinquent debt owed to any federal agency.²⁸⁹ Nonpayment of regulatory fees is a debt owed to the United States pursuant to 31 U.S.C. 3711 *et seq.*, and the DCIA. Appropriate enforcement measures, as well as administrative and judicial remedies, may be exercised by the Commission. Debts owed to the Commission may result in a person or entity being denied a federal loan or loan guarantee pending before another federal agency until such obligations are paid.²⁹⁰

²⁸⁶ See 47 C.F.R. § 1.1162 for the general exemptions from regulatory fees. *E.g.*, Amateur radio licensees (except applicants for vanity call signs) and operators in other non-licensed services (*e.g.*, Personal Radio, part 15, ship and aircraft). Governments and non-profit (exempt under section 501(c) of the Internal Revenue Code) entities are exempt from payment of regulatory fees and need not submit payment. Non-commercial educational broadcast licensees are exempt from regulatory fees as are licensees of auxiliary broadcast services such as low power auxiliary stations, television auxiliary service stations, remote pickup stations and aural broadcast auxiliary stations where such licenses are used in conjunction with commonly owned non-commercial educational stations. Emergency Alert System licenses for auxiliary service facilities are also exempt as are instructional television fixed service licensees. Regulatory fees are automatically waived for the licensee of any translator station that: (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from members of the community served for support. Receive only earth station permittees are exempt from payment of regulatory fees. A regulatee will be relieved of its fee payment requirement if its total fee due, including all categories of fees for which payment is due by the entity, amounts to less than \$10.

²⁸⁷ 47 C.F.R. § 1.1164.

²⁸⁸ 47 C.F.R. § 1.1164(c).

²⁸⁹ Public Law 104-134, 110 Stat. 1321 (1996).

²⁹⁰ 31 U.S.C. § 7701(c)(2)(B).

83. The Commission's rules currently provide for relief in exceptional circumstances. Persons or entities may request a waiver, reduction or deferment of payment of the regulatory fee.²⁹¹ However, timely submission of the required regulatory fee must accompany requests for waivers or reductions. This will avoid any late payment penalty if the request is denied. The fee will be refunded if the request is granted. In exceptional and compelling instances (e.g. where payment of the regulatory fee along with the waiver or reduction request could result in reduction of service to a community or other financial hardship to the regulatee), the Commission will defer payment in response to a request filed with the appropriate supporting documentation.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

84. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁹²

85. In the *FY 2012 Regulatory Fee Notice of Proposed Rulemaking*, we sought comment on alternatives that might simplify our fee procedures or otherwise benefit filers, including small entities, while remaining consistent with our statutory responsibilities in this proceeding. For example, the Commission has considered creating bills for all fee categories so that payments that are received will liquidate more quickly, thereby reducing errors in processing and improving efficiency. The Commission has also considered ways to notify small entities electronically regarding regulatory fee updates. We received no comments specifically in response to the IRFA.

86. Several categories of licensees and regulatees are exempt from payment of regulatory fees, such as government entities, tribal nations, tax exempt (non-profit) entities, amateur radio operator licensees, and entities whose total sum owed in regulatory fees is less than \$10. In addition, the Commission's waiver procedures also provide regulatees, including small entity regulatees, relief in exceptional circumstances such as financial hardship. We note that small entities in particular should be assisted by the Commission's electronic filing and payment system ("Fee Filer"), which pre-loads payment data to minimize the time spent by entities searching for payment information. The Commission's Fee Filer system also permits entities to make fee payment in a variety of ways, even on the due date of regulatory fees.

VI. Report to Congress:

87. The Commission will send a copy of this Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.²⁹³ In addition, the Commission will send a copy of this Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.²⁹⁴

²⁹¹ 47 C.F.R. § 1.1166.

²⁹² 5 U.S.C. § 603.

²⁹³ See 5 U.S.C. § 801(a)(1)(A). The Congressional Review Act is contained in Title II, § 251, of the CWAAA; see Pub. L. No. 104-121, Title II, § 251, 110 Stat. 868.

²⁹⁴ See 5 U.S.C. § 604(b).

ATTACHMENT G

FY 2011 Schedule of Regulatory Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Fee Category	Annual Regulatory Fee (U.S. \$'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	40
Microwave (per license) (47 CFR part 101)	25
218-219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	65
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	50
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	20
PLMRS (Shared Use) (per license) (47 CFR part 90)	20
Aviation (Aircraft) (per station) (47 CFR part 87)	10
Aviation (Ground) (per license) (47 CFR part 87)	15
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.42
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.17
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/ MDS) (per license) (47 CFR part 21)	310
Local Multipoint Distribution Service (per call sign) (47 CFR part 101)	310
AM Radio Construction Permits	490
FM Radio Construction Permits	675
TV (47 CFR part 73) VHF Commercial	
Markets 1-10	84.625
Markets 11-25	68.175
Markets 26-50	40.475
Markets 51-100	22.750
Remaining Markets	6.100

Fee Category	Annual Regulatory Fee (U.S. \$'s)
Construction Permits	6.100
TV (47 CFR part 73) UHF Commercial	
Markets 1-10	34.650
Markets 11-25	32.950
Markets 26-50	20.950
Markets 51-100	12.325
Remaining Markets	3.275
Construction Permits	3.275
Satellite Television Stations (All Markets)	1.250
Construction Permits – Satellite Television Stations	670
Low Power TV, Class A TV, TV/FM Translators & Boosters (47 CFR part 74)	395
Broadcast Auxiliaries (47 CFR part 74)	10
CARS (47 CFR part 78)	370
Cable Television Systems (per subscriber) (47 CFR part 76)	.93
Interstate Telecommunication Service Providers (per revenue dollar)	.00375
Earth Stations (47 CFR part 25)	245
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100)	131.375
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	141.750
International Bearer Circuits - Terrestrial/Satellites (per 64KB circuit)	.35
International Bearer Circuits - Submarine Cable	See Table Below

FY 2011 SCHEDULE OF REGULATORY FEES (continued)

FY 2011 RADIO STATION REGULATORY FEES						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	\$700	\$575	\$525	\$600	\$675	\$850
25,001 – 75,000	\$1,400	\$1,150	\$800	\$900	\$1,350	\$1,500
75,001 – 150,000	\$2,100	\$1,450	\$1,050	\$1,500	\$1,850	\$2,750
150,001 – 500,000	\$3,150	\$2,450	\$1,575	\$1,800	\$2,875	\$3,600
500,001 – 1,200,000	\$4,550	\$3,750	\$2,625	\$3,000	\$4,550	\$5,300
1,200,001 – 3,000,00	\$7,000	\$5,750	\$3,950	\$4,800	\$7,425	\$8,500
>3,000,000	\$8,400	\$6,900	\$5,000	\$6,000	\$9,450	\$11,050

FY 2011 SCHEDULE OF REGULATORY FEES
International Bearer Circuits - Submarine Cable

Submarine Cable Systems (capacity as of December 31, 2010)	Fee amount	Address
< 2.5 Gbps	\$12,825	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
2.5 Gbps or greater, but less than 5 Gbps	\$25,650	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
5 Gbps or greater, but less than 10 Gbps	\$51,300	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
10 Gbps or greater, but less than 20 Gbps	\$102,625	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
20 Gbps or greater	\$205,225	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000

ATTACHMENT H

Rule Changes

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:
Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), 309.
2. Section 1.1152 is revised to read as follows:

§ 1.1152 Schedule of annual regulatory fees and filing locations for wireless radio services.

Exclusive use services (per license)	Fee Amount ²⁹⁵	Address
1. Land Mobile (Above 470 MHz and 220 MHz Local, Base Station & SMRS) (47 CFR part 90)		
a) New, Renew/Mod (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c) Renewal Only (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d) Renewal Only (Electronic Filing) (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
220 MHz Nationwide	\$35.00	FCC
a) New, Renew/Mod (FCC 601 & 159)		P.O. Box 979097 St. Louis, MO 63197-9000
b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000

²⁹⁵ Note that "small fees" are collected in advance for the entire license term. Therefore, the annual fee amount shown in this table that is a small fee (categories 1 through 5) must be multiplied by the 5- or 10-year license term, as appropriate, to arrive at the total amount of regulatory fees owed. It should be further noted that application fees may also apply as detailed in §1.1102 of this chapter.

c)Renewal Only (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 601 & 159)	\$35.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
2. Microwave (47 CFR Pt. 101) (Private)		
a)New, Renew/Mod (FCC 601 & 159)	\$20.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b)New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$20.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c)Renewal Only (FCC 601 & 159)	\$20.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 601 & 159)	\$20.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
3. 218-219 MHz Service		
a)New, Renew/Mod (FCC 601 & 159)	\$70.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b)New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$70.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c)Renewal Only (FCC 601 & 159)	\$70.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 601 & 159)	\$70.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
4. Shared Use Services		
Land Mobile (Frequencies Below 470 MHz – except 220 MHz)		
a)New, Renew/Mod (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000

b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c) Renewal Only (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d) Renewal Only (Electronic Filing) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
General Mobile Radio Service		
a) New, Renew/Mod (FCC 605 & 159)	\$5.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b) New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	\$5.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c) Renewal Only (FCC 605 & 159)	\$5.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d) Renewal Only (Electronic Filing) (FCC 605 & 159)	\$5.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
Rural Radio (Part 22)		
a) New, Additional Facility. Major Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b) Renewal, Minor Renew/Mod (Electronic Filing) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
Marine Coast		
a) New Renewal/Mod (FCC 601 & 159)	\$50.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b) New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	\$50.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000

c)Renewal Only (FCC 601 & 159)	\$50.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 601 & 159)	\$50.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
Aviation Ground		
a)New, Renewal/Mod (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b)New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c)Renewal Only (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Only) (FCC 601 & 159)	\$15.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
Marine Ship		
a)New, Renewal/Mod (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b)New, Renewal/Mod (Electronic Filing) (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
c)Renewal Only (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
Aviation Aircraft		
a)New, Renew/Mod (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
b)New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000

c)Renewal Only (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
d)Renewal Only (Electronic Filing) (FCC 605 & 159)	\$10.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000
5. Amateur Vanity Call Signs	\$1.50	FCC
a)Initial or Renew (FCC 605 & 159)		P.O. Box 979097 St. Louis, MO 63197-9000
b)Initial or Renew (Electronic Filing) (FCC 605 & 159)	\$1.50	FCC P.O. Box 979097 St. Louis, MO 63197-9000
6. CMRS Cellular/Mobile Services (per unit) (FCC 159)	\$.17²⁹⁶	FCC P.O. Box 979084 St. Louis, MO 63197-9000
7. CMRS Messaging Services (per unit) (FCC 159)	\$.08²⁹⁷	FCC P.O. Box 979084 St. Louis, MO 63197-9000
8. Broadband Radio Service (formerly MMDS and MDS)	\$ 475	FCC, P.O. Box 979084 St. Louis, MO 63197-9000
9. Local Multipoint Distribution Service	\$ 475	FCC, , P.O. Box 979084 St. Louis, MO 63197-9000

3. Section 1.1153 is revised to read as follows:

§ 1.1153 Schedule of annual regulatory fees and filing locations for mass media services.

Radio [AM and FM] (47 CFR part 73)	Fee Amount	Address
1. <u>AM Class A</u>		
<=25,000 population	\$725	FCC, Radio
25,001-75,000 population	\$1,475	P.O. Box 979084
75,001-150,000 population	\$2,200	St. Louis, MO
150,001-500,000 population	\$3,300	63197-9000
500,001-1,200,000 population	\$4,775	
1,200,001-3,000,000 population	\$7,350	
>3,000,000 population	\$8,825	

²⁹⁶ These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

²⁹⁷ These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

2.	<u>AM Class B</u>		
	<=25,000 population	\$600	FCC, Radio
	25,001-75,000 population	\$1,225	P.O. Box 979084
	75,001-150,000 population	\$1,525	St. Louis, MO
	150,001-500,000 population	\$2,600	63197-9000
	500,001-1,200,000 population	\$3,975	
	1,200,001-3,000,000 population	\$6,100	
	>3,000,000 population	\$7,325	
3.	<u>AM Class C</u>		
	<=25,000 population	\$550	FCC, Radio
	25,001-75,000 population	\$850	P.O. Box 979084
	75,001-150,000 population	\$1,125	St. Louis, MO
	150,001-500,000 population	\$1,675	63197-9000
	500,001-1,200,000 population	\$2,800	
	1,200,001-3,000,000 population	\$4,200	
	>3,000,000 population	\$5,325	
4.	<u>AM Class D</u>		
	<=25,000 population	\$625	FCC, Radio
	25,001-75,000 population	\$950	P.O. Box 979084
	75,001-150,000 population	\$1,600	St. Louis, MO
	150,001-500,000 population	\$1,900	63197-9000
	500,001-1,200,000 population	\$3,175	
	1,200,001-3,000,000 population	\$5,075	
	>3,000,000 population	\$6,350	
5.	AM Construction Permit	\$550	FCC, Radio
			P.O. Box 979084
			St. Louis, MO
			63197-9000
6.	<u>FM Classes A, B1 and C3</u>		
	<=25,000 population	\$700	FCC, Radio
	25,001-75,000 population	\$1,425	P.O. Box 979084
	75,001-150,000 population	\$1,950	St. Louis, MO
	150,001-500,000 population	\$3,025	63197-9000
	500,001-1,200,000 population	\$4,800	
	1,200,001-3,000,000 population	\$7,800	
	>3,000,000 population	\$9,950	
7.	<u>FM Classes B, C, C0, C1 and C2</u>		
	<=25,000 population	\$875	FCC, Radio
	25,001-75,000 population	\$1,550	P.O. Box 979084
	75,001-150,000 population	\$2,875	St. Louis, MO
	150,001-500,000 population	\$3,750	63197-9000
	500,001-1,200,000 population	\$5,525	
	1,200,001-3,000,000 population	\$8,850	
	>3,000,000 population	\$11,500	

8.	FM Construction Permits	\$700	FCC, Radio P.O. Box 979084 St. Louis, MO 63197-9000
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TV (47 CFR, part 73)**VHF Commercial**

1.	Markets 1 thru 10	\$80,075	FCC, TV Branch
2.	Markets 11 thru 25	\$73,475	P.O. Box 979084
3.	Markets 26 thru 50	\$39,800	St. Louis, MO
4.	Markets 51 thru 100	\$20,925	63197-9000
5.	Remaining Markets	\$ 5,825	
6.	Construction Permits	\$ 5,825	

UHF Commercial

1.	Markets 1 thru 10	\$35,350	FCC,UHF Commercial
2.	Markets 11 thru 25	\$32,625	P.O. Box 979084
3.	Markets 26 thru 50	\$21,925	St. Louis, MO
4.	Markets 51 thru 100	\$12,750	63197-9000
5.	Remaining Markets	\$3,425	
6.	Construction Permits	\$3,425	

Satellite UHF/VHF Commercial

1.	All Markets	\$1,425	FCC Satellite TV
2.	Construction Permits	\$ 895	P.O. Box 979084 St. Louis, MO 63197-9000

**Low Power TV, Class A TV, TV/FM
Translator, & TV/FM Booster
(47 CFR part 74)**

\$ 385	FCC, Low Power P.O. Box 979084 St. Louis, MO 63197-9000
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Broadcast Auxiliary

\$ 10	FCC, Auxiliary P.O. Box 979084 St. Louis, MO 63197-9000
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4. Section 1.1154 is revised to read as follows:

§ 1.1154 Schedule of annual regulatory charges and filing locations for common carrier services.

Radio Facilities	Fee Amount	Address
1. Microwave (Domestic Public Fixed) (Electronic Filing) (FCC Form 601 & 159)	\$20.00	FCC P.O. Box 979097 St. Louis, MO 63197-9000

Carriers

- | | | | |
|----|--|-----------|--|
| 1. | Interstate Telephone Service Providers
(per interstate and international end-user
revenues (see FCC Form 499-A)) | \$.00375 | FCC, Carriers
P.O. Box 979084
St. Louis, MO 63197-9000 |
|----|--|-----------|--|

5. Section 1.1155 is revised to read as follows:

§ 1.1155 Schedule of regulatory fees and filing locations for cable television services.

	Fee Amount	Address
1. Cable Television Relay Service	\$475	FCC, Cable
2. Cable TV System (per subscriber)	\$.95	P.O. Box 979084 St. Louis, MO 63197-9000

6. Section 1.1156 is revised to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services.

- a. The following schedule applies for the listed services:

Fee Category	Fee Amount	Address
Space Stations (Geostationary Orbit)	\$132,875	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
Space Stations (Non-Geostationary Orbit)	\$143,150	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
Earth Stations: Transmit/Receive & Transmit only (per authorization or registration)	\$275	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000

- b. *International Terrestrial and Satellite.* Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31 of the prior year in any terrestrial or satellite transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. "Active circuits" for these purposes include backup and redundant circuits. In addition, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

The fee amount, per active 64 KB circuit or equivalent will be determined for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000.

International Terrestrial and Satellite (capacity as of December 31, 2011)	Fee Amount	Address
Terrestrial Common Carrier Satellite Common Carrier Satellite Non-Common Carrier	\$0.26 per 64 KB Circuit	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000

c. *Submarine cable:* Regulatory fees for submarine cable systems will be paid annually, per cable landing license, for all submarine cable systems operating as of December 31 of the prior year. The fee amount will be determined by the Commission for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000.

Submarine Cable Systems (capacity as of Dec. 31, 2011)	Fee Amount	Address
< 2.5 Gbps	\$13,300	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
2.5 Gbps or greater, but less than 5 Gbps	\$26,600	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
5 Gbps or greater, but less than 10 Gbps	\$53,200	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
10 Gbps or greater, but less than 20 Gbps	\$106,375	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000
20 Gbps or greater	\$212,750	FCC, International, P.O. Box 979084, St. Louis, MO 63197-9000

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
	)	MD Docket No. 12-201
Procedures for Assessment and Collection of)	
Regulatory Fees)	
)	
Assessment and Collection of Regulatory Fees for	)	MD Docket No. 08-65
Fiscal Year 2008)	

NOTICE OF PROPOSED RULEMAKING

Adopted: July 13, 2012

Released: July 17, 2012

By the Commission: Commissioners McDowell and Pai issuing separate statements.

Comment Date: [30 days after publication in the Federal Register]

Reply Comment Date: [60 days after publication in the Federal Register]

By the Commission:

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I. INTRODUCTION

1. Today we seek comment on proposals to reform the Commission's policies and procedures for assessing and collecting regulatory fees. Extensive changes have occurred in the communications marketplace, and in the Commission's regulatory efforts, since the Schedule of Regulatory Fees was enacted by Congress in 1994. In the period directly following enactment of the Telecommunications Act of 1996, industry development and Commission regulation centered primarily on wireline local and long distance communications. Subsequently, however, the mobile wireless industry has grown exponentially, shifting Commission resources to, among other things, the wireless industry, while the costs of implementing the 1996 Telecommunications Act decreased. Meanwhile, digital and Internet protocol (IP)-based technologies have enabled wired and wireless companies, satellite companies, broadcasters, and cable television companies to engage in increased intermodal competition.

2. These changes have produced corresponding shifts in the Commission's regulatory activity. These shifts in the cost of the Commission's activities are not always reflected in our current regulatory fees. Although the Commission has made a number of discrete changes to the regulatory fee program since 1994, we have not revised the data on which our fees are based since 1998, nor have we undertaken a comprehensive analysis of all the substantive and procedural aspects of our regulatory fee program in light of the current state of the communications industry. This proceeding will serve as the means by which we will undertake that comprehensive analysis.¹

3. This Notice of Proposed Rulemaking seeks comment on the issues related to how the Commission should allocate its regulatory costs among different segments of the communications industry. In particular, we seek comment on:

- *What the Overarching Goals of the Regulatory Fee Program Should Be.* We propose three goals to guide our regulatory fee policymaking—fairness, administrability, and sustainability—and we seek comment on these goals and invite commenters to propose others.
- *Regulatory Costs Should Be Allocated.* Section 9 of the Communications Act requires that regulatory fees be derived by determining the number of full-time equivalent employees (FTEs) performing certain activities. We propose to change the way we allocate “direct” and “indirect” FTEs to calculate regulatory fees. The proposals on which we seek comment are based on aggregated bureau-level FTE data, and would allocate all FTEs in the Wireless Telecommunications, Media, Wireline Competition, and International Bureaus as “direct” and all FTEs in the support bureaus and offices as “indirect.”
- *How Current Cost Allocation Percentages Should Be Revised.* We then look at the cost allocation percentages that we use now and propose to update these percentages using current FTE data derived from the reallocation of FTEs described above. We set out the adjustments projected to result from these updates, examine the impact of these adjustments on the categories of fee payors, ask whether and how we should mitigate the

¹ A number of comments on revising the regulatory fee program were received in MD Docket No. 08-65. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, Report and Order and Further Notice of Proposed Rulemaking, 73 FR 50285 (August 26, 2008) (“FY 2008 Further Notice of Proposed Rulemaking”). We will incorporate those comments into the record of this proceeding.

impact of any substantial fee increases that would result, and ask whether any other changes are necessary to ensure an equitable result.

II. BACKGROUND

A. Statutory Framework

4. Section 9(a)(1) of the Communications Act directs the Commission to collect regulatory fees “to recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities.”² Section 9(a)(2) stipulates that regulatory fees for the enumerated activities “shall be collected only if, and only in the total amounts, required in Appropriations Acts,” and must “be established in amounts that will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year for the performance of the activities described in subsection (a).”³ Since FY 2009, Congress has directed the Commission to assess and collect regulatory fees under section 9(b)(1)(B) in an amount equal to the entire amount appropriated.⁴

5. Section 9(b) states in general terms how regulatory fees are to be derived. Section 9(b)(1)(A) states that fees are to be calculated by determining the full-time equivalent number of employees (FTEs) performing the activities enumerated in section 9(a)(1) “within the three licensing bureaus as they existed at that time and that formed the core of our regulatory fee assessment program, *i.e.* the Private Radio Bureau, Mass Media Bureau, and Common Carrier Bureau.”⁵ FTEs in the other offices of the Commission are also calculated, and the fees that result are adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest.⁶ The Commission issues a notice of proposed rulemaking (NPRM) in the third quarter of each fiscal year, stating how it derives the fees for that fiscal year and proposing the amounts that the payors in each fee category will be required to

² 47 U.S.C. § 159(a)(1).

³ *Id.* § 159(a)(2), (b)(1)(B).

⁴ See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 (Dec. 23, 2011) (appropriating \$339,844,000 and providing “[t]hat \$339,844,000 of offsetting collections shall be assessed and collected pursuant to section 9 of title I of the Communications Act of 1934, [and] shall be retained and used for necessary expenses in this appropriation”). In prior years (FY 2004 through FY 2008), Congress directed the Commission to offset all but \$1 million of its appropriation. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-99, 118 Stat. 3 (2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2908 (2004); Science, State, Justice, Commerce and Related Agencies Appropriation Act, 2006, Pub. L. No. 109-108, 199 Stat. 2290, 2329-30 (2005); Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (2007); and Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1998 (2007). In the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 657 (2009) Congress required, for the first time that the Commission collect fees in the full amount of its appropriation.

⁵ Subsequent to the enactment of section 9 the Commission reorganized and renamed the Private Radio Bureau, Mass Media Bureau, and Common Carrier Bureaus as the Wireless Telecommunications Bureau, Media Bureau, and Wireline Competition Bureau respectively. Regulation of international telecommunications was transferred from these Bureaus and consolidated into a new International Bureau. For simplicity and ease of reference, in this Notice we will refer to these four bureaus as the “core” bureaus or the “core licensing” bureaus.

⁶ 47 U.S.C. § 159(b)(1)(A).

pay in order to offset the amount of the Commission's appropriation for that fiscal year.⁷ The Commission issues a report and order during the fourth quarter of each fiscal year.⁸ The report and order sets the amounts to be paid by all fee payors, discusses any issues raised in response to the NPRM and sets out the procedures for payment of fees.

B. Historic Regulatory Approach

6. Section 9(b)(1)(A) states that regulatory fees are to recover the costs of the FTEs performing the regulatory activities set forth in section 9(a)(1). Consistent with this statutory requirement, the Commission's cost assessment methodology uses FTEs as the starting point in determining the fees regulatees in each fee category will pay each fiscal year.

7. Although the statute specifies that FTEs are the basis for calculating regulatory fees, it does not specify the precise type of FTE data that must be used: *e.g.*, whether the Commission must use employees' time cards to tally the time each employee reports as having been spent on regulating specific licensees or regulatees, or whether the Commission may aggregate the work of FTEs in some other way. In FYs 1997-1998, the Commission based its FTE calculations on employee time cards. This method involved employees' tracking time by regulatory fee category, and regulatory fees were then allocated based on a core bureaus' relative share of employee time, both direct (employees within a core bureau working on matters related to regulatory fee categories within that bureau) and indirect (employees from all bureaus and offices providing support functions related to multiple, perhaps even all, regulatory fee categories). The Commission abandoned this approach in FY 1999 because not only did time card entries prove subjective and unreliable, but they also resulted in unpredictable and substantial shifts in regulatory fees from year to year.

8. The allocations of direct and indirect FTEs we currently use are taken from FTE data compiled in FY 1998. The Commission allocates FTEs according to the nature of the employees' work. If the work performed by an employee can be assigned to a regulatory fee category in one of the four core licensing bureaus—Wireless Telecommunications, Media, Wireline Competition, and International, —that employee's time is counted as a direct FTE. If the work cannot be assigned to one of the bureau's designated fee categories, the employee's time is counted as an indirect FTE. Indirect FTEs are allocated proportionally across the four core bureaus. Therefore, under our current system, the total FTEs for each fee category includes the direct FTEs associated with that category, plus proportional allocations of indirect FTEs from inside and outside the bureau. The total number of FTEs for each of the bureau's fee categories was then divided by the combined FTE numbers for all four core bureaus to produce an allocation percentage for each fee category. *e.g.*, the percentage of total regulatory fee revenues that must be recovered from each fee category in order to collect the total amount specified by Congress.⁹

⁷ See, *e.g.*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2011*, Notice of Proposed Rulemaking, 26 FCC Red 7068 (2011) ("FY 2011 Notice of Proposed Rulemaking").

⁸ See, *e.g.*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2011*, Report and Order, 26 FCC Red 10812 (2011) ("FY 2011 Report and Order").

⁹ The Schedule of Regulatory Fees enacted as section 9(g) in 1994 contained the fees to be paid by different categories of regulatees in the (then) three named bureaus. Section 9(g) specified that the Commission was to use this fee schedule until the Commission adjusted it pursuant to section 9(b). The Commission has made substantial adjustments to this fee schedule since 1994, adding fee categories and altering others. The 46 categories of fee payors listed in the original fee schedule had grown to 86 in 2011.

9. Although the Commission has used the same allocation percentages every fiscal year since FY 1998, each year the Commission reviews the projected number of fee payors in each service category. These payors are referred to generically as "units," because the fees for payors in different service categories reflect characteristics appropriate to each service, such as the number of licenses or number of subscribers the fee payor has. We look for changes in the industry, changes in industry segments, and various other issues as explained in each year's regular regulatory fee NPRM. Finally, the fee rate for each fee category is determined by dividing the revenue amount to be collected from each fee category by its projected number of units.

10. Table 1 illustrates the process using this methodology. Each fiscal year Congress reviews the Commission's budget submission and determines the appropriation for that year. The amount Congress appropriates becomes the target for the aggregate amount of regulatory fees to be collected. Table 1 uses a hypothetical appropriation of \$100,000,000 as the target amount of regulatory fees to be collected. Column 1 represents the various fee categories in which a regulatee will pay a fee. Column 2 shows the allocation percentages that are applied. And Column 3 represents the multiplication of the target amount by each allocation percentage.

11. The Commission first multiplies the \$100,000,000 target amount by the current FTE allocation percentages in Column 2 to determine the amount of revenue to be collected from each fee category in Column 3. To determine the regulatory fee rate, the amounts in Column 3 are divided by their respective unit counts (the number of payors) to determine the fee amount that each regulatee will pay in that fee category prior to rounding pursuant to section 9(b)(2)(B). Thus, each year the regulatory fee rate is a function of (1) changes in the appropriation amount from one year to the next, and (2) changes in the unit count from the prior year for each respective fee category.

TABLE 1
Hypothetical \$100 Million Target Goal Allocations

COLUMN ONE	COLUMN TWO	COLUMN THREE
Fee Category	Starting Point FTE Allocation Percentage (%)	Expected Revenue Amount by Fee Category
PLMRS (Exclusive Use)	.14%	\$140,000
PLMRS (Shared use)	.67%	\$670,000
Microwave	.66%	\$660,000
218-219 MHz (Formerly IVDS)	.001%	\$1,000
Marine (Ship)	.22%	\$220,000
GMRS	.08%	\$80,000
Aviation (Aircraft)	.10%	\$100,000
Marine (Coast)	.04%	\$40,000
Aviation (Ground)	.04%	\$40,000
Amateur Vanity Call Signs	.06%	\$60,000
AM Class A	.07%	\$70,000
AM Class B	.87%	\$870,000

COLUMN ONE Fee Category	COLUMN TWO Starting Point FTE Allocation Percentage (%)	COLUMN THREE Expected Revenue Amount by Fee Category
AM Class C	.31%	\$310,000
AM Class D	1.03%	\$1,030,000
FM Classes A, B1 & C3	2.13%	\$2,130,000
FM Classes B, C, C0, C1 & C2	2.62%	\$2,620,000
AM Construction Permits	.01%	\$10,000
FM Construction Permits	.1%	\$100,000
Satellite TV	.05%	\$50,000
Satellite TV Construction Permit	.001%	\$1,000
VHF Markets 1-10	.95%	\$950,000
VHF Markets 11-25	.97%	\$970,000
VHF Markets 26-50	.82%	\$820,000
VHF Markets 51-100	.79%	\$790,000
VHF Remaining Markets	.35%	\$350,000
VHF Construction Permits	.01%	\$10,000
UHF Markets 1-10	.6%	\$600,000
UHF Markets 11-25	.49%	\$490,000
UHF Markets 26-50	.41%	\$410,000
UHF Markets 51-100	.35%	\$350,000
UHF Remaining Markets	.11%	\$110,000
UHF Construction Permits	.07%	\$70,000
Broadcast Auxiliaries	.08%	\$80,000
LPTV/Translators/Boosters/Class A TV	.40%	\$400,000
CARS Stations	.05%	\$50,000
Cable TV Systems	16.55%	\$16,550,000
Interstate Telecommunication Service Providers	46.66%	\$46,660,000
CMRS Mobile Services (Cellular/Public Mobile)	14.33%	\$14,330,000
CMRS Messaging Services	.32%	\$320,000
BRS	.16%	\$160,000
LMDS	.03%	\$30,000
Per 64 kbps Int'l Bearer Circuits, Terrestrial (Common) & Satellite (Common & Non-Common)	.32%	\$320,000
Submarine Cable Providers	2.28%	\$2,280,000
Earth Stations	.25%	\$250,000
Space Stations (Geostationary)	3.23%	\$3,230,000
Space Stations (Non-Geostationary)	.24%	\$240,000
***** Total Estimated Revenue to be Collected	100.00%	\$100,022,000

C. The Problems of the Current Approach

12. As noted previously, the changes that have occurred since 1998 in the communications industry have caused significant shifts in the amount of time the Commission devotes to specific industry segments and activities. Therefore, FY 1998 FTE data may no longer accurately reflect the allocation of Commission employees' time across different parts of the industry. However, simply substituting current FTE data for the 1998 FTE data would cause fees for some classes of fee payors to increase significantly, so we seek to examine how best to address in a fair and equitable manner any significant shifts. In addition, new technologies have caused an exponential increase in intermodal competition across formerly distinct industry platforms. This has made it even more common today than in 1998 that a Commission employee's work may be attributed to more than one fee category. For example, the cost of an employee's work in designing incentive auctions might be attributable to several fee categories within the media sector, but it would also potentially benefit providers of mobile broadband services who would ultimately use the reclaimed spectrum. The practical difficulties we would encounter today in parsing out an employee's time among all of the industry groups affected by his or her work would produce unpredictable annual changes in regulatory fees. Proposals to address these and related problems are presented below.

III. ISSUES RAISED FOR COMMENT

A. Setting Goals To Guide Our Approach to Regulatory Fees

13. First, we seek comment on setting goals for regulatory fee collection that will guide the reforms that result from this Notice and adjustments that the Commission will need to make from time to time afterwards. We are of course guided first and foremost by Congress's direction in section 9. At the same time, Congress has left us flexibility in setting the fees to take into account a variety of factors, including "factors that the Commission determines are necessary in the public interest."¹⁰ We propose three overarching goals for the regulatory fees program, and we invite parties to propose other goals for consideration.

14. *Fairness.* Allocation of regulatory fee burdens among regulatees should be fair. All regulatees interact with and benefit from the work of the Commission, but not in equal measure. For example, a very large company with hundreds of licenses and authorizations is likely to engage much more frequently with the Commission than a local company or cooperative. Similarly, regulatees' ability to pay varies with their size and revenues—imposing the same fee on a Fortune 500 company and a local family business would have very different effects on those entities. And over time, as similar services are provided over different technologies, regulatees may be paying different fees while providing similar services, not because there is a meaningful difference in their relationship with the Commission but simply because their services fall into different fee categories (or fall outside our established categories altogether). We propose establishing fairness as a goal of our regulatory fee program, so that the burdens of regulatory fees are borne in an equitable manner that does not distort the marketplace. We seek comment on this goal.

15. *Administrability.* Section 9 directs that fees be set by reference to the number of FTEs performing enforcement activities, policy and rulemaking activities, user information services, and international activities within the Wireless Telecommunications, Media, Wireline Competition, and International Bureaus. A fee system that strictly aligned FTEs with these activities and Bureaus on an ongoing basis would require a complex time and accounting system like the one the Commission tried in

¹⁰ 47 U.S.C. § 159(b)(1)(A).

1997 and 1998 and abandoned in 1999 due in part to the unpredictability and rapid shifts in fee rates that it created for fee payors. Keeping the fee schedule up to date could result in large shifts in fees from year to year, as the Commission's priorities and areas of focus change. For example, if in one year the Public Safety and Homeland Security Bureau handles rulemakings related to broadcasting, but in the following year focuses on wireless services, the resulting shift in FTE allocations could have a substantial impact on the size of regulatory fees, which could then shift significantly again the very next year. We believe that the regulatory fee system should be administrable, both for the Commission and for payors. We seek comment on this goal.

16. *Sustainability.* The methodology for regulatory fees should be flexible enough to adapt to changes in technology and marketing that affect how our regulatees do business. In 2007, the Commission extended regulatory fee obligations to providers of interconnected voice over Internet protocol services (VoIP), noting "the many and increasing resources the Commission now dedicates to VoIP" and that "[i]nterconnected VoIP service is increasingly used to replace traditional telephone service and . . . the interconnected VoIP service industry continues to grow and to attract customers who previously relied on traditional voice service."¹¹ The concern the Commission addressed in 2007 will continue to arise as service platforms and models change and converge. As video, voice, and data services are provided in new ways, our regulatory fee system must also evolve to ensure that the fee burden remains equitably distributed among regulatees. We seek comment on this goal.

17. Our goals must work within the statute, not against it. Section 9 requires that the Commission collect fees by determining "the full-time equivalent number of employees" performing specified activities in the Bureaus and Offices. We intend that the proposed goals guide our interpretation of section 9, and we seek comment on the best ways to take the goals into account as we assign FTEs to the statutory categories and establish specific fee amounts.

B. Changing the Current Cost Allocation Methodology

18. As explained more fully below, the cost allocation data we currently use were derived in FY 1998 by totaling employees' time cards entries to arrive at the aggregate number of FTEs engaged in each feeable activity. The first question that arises is whether the Commission should aggregate employee time card entries to derive its FTE allocations, or whether aggregating data on a less granular basis would be accurate and workable. For the reasons discussed below, we seek comment on whether we should simplify the way direct and indirect FTEs are aggregated and update the FTE data that we use. We invite interested parties to share their views with respect to the issues set forth below.

1. Reallocation of FTEs Among Bureaus

19. Although not required by Section 9, our current cost assignment methodology is based on the presumption that work of employees in the four core bureaus should be treated differently depending on whether an employee is "directly" involved in a feeable activity or "indirectly" involved, as in a support capacity. The costs of FTEs directly working on projects corresponding to a regulatory fee category are directly assigned to that category. By contrast, the costs of all FTEs in the core bureaus indirectly involved, or providing support functions, are treated as indirect costs and are currently distributed proportionally across the four core bureau. The proportional allocation of indirect FTEs corresponds to each core bureau's actual percentage of direct FTEs. The indirect work performed by FTEs within a core bureau, therefore, may not be attributable to a specific fee category in their core

¹¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order, 22 FCC Rcd 15712, 15717-18 ¶¶ 12-13 (2007).

bureau. Nevertheless, it is clear that the work of *all* the FTEs in a core bureau, whether direct or indirect, contributes to the cost of regulating licensees of that bureau. Therefore, we may reasonably expect that the work of the FTEs in the core bureaus would remain focused on the industry segment regulated by each of those bureaus.¹² We seek comment on whether we should change the way FTEs are allocated within a bureau, and we propose that all the FTEs in each of the core bureaus should be considered direct FTE costs for that bureau.

20. Most of the work of the bureaus and offices outside the four core licensing bureaus is currently considered as indirect FTE costs because the work does not focus on any one industry segment; rather, these bureaus and offices support the work of all of the core bureaus. As with the indirect FTEs within the core bureaus, the work of FTEs in non-core bureaus that cannot be directly assigned to a regulatory fee category is treated as indirect costs and distributed proportionally across the core bureaus according to these bureaus' respective percentages of the Commission's total direct FTE costs. As in the case of our allocation of direct FTEs, we believe that it would serve the public interest to find a more consistent and workable way to allocate indirect FTEs. Any attempt to redistribute these indirect costs on a task-by-task basis would be neither consistent nor workable, requiring us to assign more costs to certain divisions of support bureaus or offices for certain licensees at a given point in time, and then reassign these costs as the work of that division changes from month to month, week to week, or even day to day.¹³ This would be far more complicated and subjective than our current approach, requiring constant recalculations as FTEs within a bureau are given different job assignments.¹⁴ Unlike the case of the FTEs in the core bureaus, the work of the FTEs in the support bureaus and offices is not primarily focused on any one bureau or regulatory fee category, but instead serves the needs of all four core bureaus.

21. Just as section 9 contains no requirement that we classify FTEs as "direct" and "indirect," it does not prescribe how the Commission should account for the FTE costs of its support bureaus and offices. Consistent with our finding in paragraph 19 above that the work of the employees in the core bureaus and offices is primarily focused on the industry segment regulated by each bureau and that the work — and the costs — of all the employees of those bureaus would correctly be considered direct FTE costs of their respective bureaus, we seek comment on whether, because the work of employees in the non-core bureaus supports the work of all the core bureaus, the FTE costs of these non-core bureaus and offices should all be treated as indirect costs and allocated among each of the core bureaus in the same percentage as that bureau's direct FTE percentage is to the total direct FTE costs of all the core bureaus.

2. Updating and Adjusting the Allocation Percentages Among Bureaus

22. We have previously sought comment on whether and how to update our current FTE allocation percentages to reflect changes in the industry and in the Commission's workload that have

¹² The International Bureau may be an exception to this expectation as discussed in Paragraphs 26 - 28. , below.

¹³ For example, under this approach the work of attorneys and support staff in Litigation and Administrative Law Divisions of the Office of General Counsel would fluctuate, and the corresponding costs would have to be continually reassigned, depending on how much of their work is being devoted to media, wireless, wireline and other matters.

¹⁴ For example, the Satellite Industry Association (SIA) states that certain divisions in the Enforcement Bureau may not be relevant to regulating satellite licensees. SIA reply comments at 8, *FY 2008 Further Notice of Proposed Rulemaking*, *supra* n. 1. While that may be true at a given point in time, at another time all members of that division may be engaged in an investigation involving satellite providers, or certain members engaged in investigations or other activity affecting satellite providers, either directly or indirectly.

occurred since they were adopted.¹⁵ We will resolve this issue in this proceeding, and we will incorporate into the record of this proceeding relevant comments filed in prior proceedings.¹⁶

23. Commenters previously addressing this issue advocated that we revise the FTE allocation percentages by using updated FTE data.¹⁷ They argued that it is inequitable to burden the licensees in the core bureaus with a larger share of regulatory fees than their respective percentage share of FTE staffing at the Commission. We seek comment on whether the FY 1998 FTE allocation percentages should be replaced with allocation percentages using up-to-date FY 2012 FTE data.

24. Reallocation of direct and indirect FTEs using aggregated FTE data involves counting the number of FTEs in each of the agency's four core licensing bureaus to determine what percentage each comprises of the total number of FTEs in all the core bureaus.¹⁸ The tentative results of this recalculation, using current FTE staffing levels, produces the following numbers and percentages of direct FTEs in the four core licensing bureaus: International Bureau, 122 FTEs (22.0% of total FTEs in the four core bureaus); Media Bureau, 183 (32.9%); Wireline Competition Bureau, 154 (27.7%); and Wireless Telecommunications Bureau, 97 (17.4%).¹⁹ These 556 FTEs constitute 36 percent of the Commission's total FTEs and we would treat them as direct FTE costs for purposes of allocating regulatory fees. There are currently 1,000 FTEs in the support bureaus and offices. As proposed in paragraph 20 above, these would all be treated as indirect FTEs and allocated proportionately across the four core bureaus. This produces the following adjusted FTE totals for each of the core bureaus: International Bureau, 221 FTEs; Media Bureau, 329 FTEs; Wireline Competition Bureau, 276 FTEs; and Wireless Telecommunications Bureau, 174 FTEs.

25. A comparison of the allocation percentages currently in use with the allocation percentages that result from the use of updated FTE figures produces mixed results. The percentage of regulatory fees currently collected from regulatees in the Wireless Telecommunications Bureau would remain unchanged at 17.4 percent. The allocation percentage would increase only slightly for fee payors in Media Bureau service categories, from 31.9 percent to 32.9 percent. However, use of the updated FTE figures would reduce the percentage of regulatory fees allocated to regulatees in the Wireline Competition Bureau from 44.0 percent to 27.7 percent and increase the percentage of fees allocated to payors in the International Bureau from 6.7 percent to 22.0 percent.

26. We seek comment on whether the projected increase in fees for International Bureau regulatees would be consistent with our goals of fairness and sustainability. In this regard we note that much of the work within the Strategic Analysis and Negotiations Division of the International Bureau covers services outside of the Bureau's direct regulatory activities. For example, this Division has

¹⁵ *FY 2008 Further Notice of Proposed Rulemaking*, supra n. 1, at ¶¶ 27-30. We also released a Public Notice on September 3, 2008 providing information on FTEs, direct costs, and indirect costs. See "Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking," Adopted August 1, 2008, MD Docket No. 08-65, Public Notice, DA 08-2033 (September 3, 2008).

¹⁶ To assure that all previous comments are considered, parties that have previously commented on any of these issues are requested to attach or cite their prior comments in their filings in this proceeding.

¹⁷ See, e.g., USTA Comments at 2; AT&T Comments at 3; FII Reply Comments at 5; EWA Reply Comments at 1-2; Sprint Reply Comments at 2; NTCA Reply Comments at 2; MetroPCS Reply Comments at 2; CTIA Reply Comments at 3; AT&T Reply Comments. *FY 2008 Further Notice of Proposed Rulemaking*, supra n. 1.

¹⁸ FTEs are based on actual end of fiscal year 2011 figures, the most recent data that is currently available.

¹⁹ These totals represent only the number of direct FTEs funded by regulatory fees. They do not include direct FTEs funded by other revenues, e.g., by auction or USF proceeds, nor do they include indirect FTEs.

primary responsibility for leading the Commission's international representation in bilateral meetings, multilateral meetings, and cross-border spectrum negotiations with Canada and Mexico on spectrum sharing arrangements, and notifications to the International Telecommunications Union (ITU), as well as participation in ITU Study Groups. Though focused on the international community, this international work covers the entire gamut of the Commission's regulatory responsibilities.

27. If such work benefits all classes of providers, should the associated FTEs be excluded from the International Bureau's direct costs and, instead, be allocated as indirect costs like a support bureau? Is this situation unique to the International Bureau? The International Bureau has estimated that as much as one half of the FTEs in the Bureau work on matters covering services other than international services. Reallocation of 50% of the FTEs in the International Bureau proportionately to the other core bureaus would result in the following allocation: International Bureau, 61 FTEs, representing 10.97% of total FTEs in the four core bureaus; Media Bureau, 208.72 (37.54%); Wireline Competition Bureau, 175.64 (31.59%); and Wireless Telecommunications Bureau, 110.64 (19.9%).

28. We ask commenters to address all the issues regarding how to ameliorate the effect of using updated FTE data on regulatees paying fees in the International Bureau's service categories. Would this reallocation be equitable?

29. Are there analogous groups within the other core bureaus whose work covers services outside of the core bureau's direct regulatory activities? If so, how should those FTEs be allocated, or should adjustments be made to our proposed allocation of FTEs for those core bureaus to account for such broadly cross-cutting work in a core bureau? We also seek comment on whether further adjustments of the allocation of FTEs should be made. Should adjustments be made whenever, as discussed above, the work of one bureau supports the work of one or more other bureaus? Would this be a workable and sufficient way to allocate regulatory fees fairly between industry sectors consistent with section 9, or is there a more equitable way, consistent with statute, to allocate regulatory fees between and/or within industry sectors? For example, should regulatory fee categories in section 9 be combined or eliminated, given the change in the telecommunications landscape since 1998? Should additional regulatory fee categories such as broadband be added to the regulatory fee schedule set forth in section 9? We seek comment on whether the Commission has authority, under section 9, to include broadband as a fee category. If additional fee categories are created, how should their costs be assessed? To the extent that licensees offer services that are regulated by more than one core bureau, how would the addition of new fee categories affect the allocation of FTEs by core bureau?

30. We note that section 9(b)(1)(A) allows the Commission to adjust regulatory fees "to take into account factors that are reasonably related to the benefits provided the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines to be in the public interest." How should "benefits provided to the payor" be determined? Should such benefit be measured by the level of regulation of such payor, or by some measure of the amount of regulatory activity attributable to a specific payor in a given year? Or should "benefits provided the payor" be found to include all benefits received as a result of the Commission's work, even benefit from efforts to reduce regulation of a particular industry sector? How does one measure such benefit? Is relative market share, or total revenues, a good measure of the benefit the payor receives from the work of the Commission to promote competition and remove barriers to market entry? If so, should all payors be assessed based on revenues? Is it technically feasible to assess all regulatory fee categories based on revenues? How could the Commission ensure such assessment is based on accurate, reliable revenue information from all industry sectors? What additional reporting requirements would be necessary to obtain the information necessary to assess all payors on a revenues basis?

31. Are there other factors the Commission should consider in rebalancing regulatory fees in order to achieve the goals discussed above? For example, does Section 9 allow the Commission to mitigate the effects of fee increases to a particular industry segment by providing interim adjustments, by phasing in the new fees over a period of time, or by providing relief in some other way? How would the Commission administer any recommended mitigation?

32. Finally, how often should the Commission revisit the allocation resulting from this rulemaking? Should this reexamination be undertaken at regular intervals, or in response to comments by fee payors in the annual regulatory fee collection NPRM? If such reexamination is done at regular intervals, for example, annually, how can we ensure continued predictability and collectability of fees? Would it be appropriate to simply update the Commission's FTE allocation each year, without regard to the impact of significant increases of regulatory fees on certain regulatory fee categories? Would such fluctuations be especially problematic for small service providers who are likely least able to absorb unpredictable changes in fees from year to year?

3. Reallocation of FTEs Within Bureaus

33. As noted previously, our current FTE allocations and the resulting allocation percentages were first used in FY 1999 and are based on FY 1998 FTE data. We request comment on updating and reallocating FTEs among the fee categories within each of the core bureaus. For example, within the International Bureau, there are five fee categories: Bearer Circuits, Submarine Cable Providers, Earth Stations, Space Stations (Geostationary), and Space Stations (Non-Geostationary). Regulatory fees are currently allocated among these five fee categories as follows: Bearer Circuits (5.1%), Submarine Cable Providers (36.1%), Earth Stations (3.9%), Space Stations (Geostationary) (51.1%), and Space Stations (Non-Geostationary) (3.8%).

34. Although one option would be to continue using these relative allocation percentages among the fee categories in each of the core bureaus, we seek comment on whether it would better serve the public interest for management in each of the core bureaus to revise their internal FTE allocation percentages based on management's assessment of the current distribution of work within the bureau. We also seek comment on whether they should do such analysis and update of the FTE allocation among fee categories within the bureau every three years unless a substantial shift in the nature or extent of a bureau's duties warrants reexamination in the interim. Commenters advocating alternatives or modifications to this proposed approach should describe in specific detail how the suggested alternative or modification would work and why it would be preferable to allocation based on assessment of the current distribution of work within the bureau described herein.

IV. CONCLUSION

35. Fundamental to this Notice is the Commission's desire to assure that the methodology we use to derive regulatory fees is consistent with statutory requirements, fair, efficiently administered, and sustainable. This Notice proposes a number of innovative alternatives designed to achieve those goals. Interested parties are invited to comment on the suitability of these goals, the effectiveness of the alternatives proposed in this Notice in meeting these or other appropriate goals, and the Commission's jurisdiction to adopt any of the alternatives discussed in the Notice or proposed in response to it.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

36. An initial regulatory flexibility analysis ("IRFA") is contained in Attachment A. Comments to the IRFA must be identified as responses to the IRFA and filed by the deadlines for

comments on the Notice. The Commission will send a copy of the Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Initial Paperwork Reduction Act of 1995 Analysis

37. This document solicits possible proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the possible proposed information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

C. Other Procedural Matters

1. Filing Instructions

38. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

39. **People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

2. *Ex Parte* Information

40. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁰ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

VI. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 159, and 303(r), this Notice of Proposed Rulemaking IS HEREBY ADOPTED.

42. IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis in Attachment B, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ 47 C.F.R. §§ 1.1200 *et seq.*

ATTACHMENT A

List of Commenters

Commenter	Abbreviated name
American Association of Paging Carriers	AAPC
AT&T, Inc.	AT&T
DirecTV, Inc. and DISH Network LLC	DirecTV and DISH
Enterprise Wireless Alliance	EWA
Independent Telephone and Telecommunications Alliance	ITTA
National Cable and Telecommunications Association	NCTA
Personal Radio Steering Group, Inc.	PRSG
PCIA – The Wireless Infrastructure Association	PCIA
United States Telecom Association	USTA
Verizon Communications, Inc.	Verizon

List of Commenters – Reply Comments

Commenter	Abbreviated name
American Cable Association	ACA
AT&T, Inc.	AT&T
CTIA – The Wireless Association®	CTIA
DirecTV, Inc. and DISH Network LLC	DirecTV and DISH
Enterprise Wireless Alliance	EWA
Forest Industries Telecommunications	FIT
MetroPCS Communications, Inc.	MetroPCS
National Telecommunications Cooperative Association	NTCA
Satellite Industry Association	SIA
Sprint Nextel Corporation	Sprint
Verizon Communications, Inc.	Verizon
Wireless Cable Coalition	WCC

ATTACHMENT B**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act (RFA),²¹ the Commission prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates indicated on the first page of this Notice of Proposed Rulemaking. The Commission will send a copy of the Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).²² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.²³

I. Need for, and Objectives of, the Notice:

2. In the Notice we seek public comment on approaches to update and reform the process by which the Commission calculates and assesses regulatory fees under section 9 of the Communications Act. We propose to be guided in this examination by the goals of fairness, administrability, and sustainability, and we seek comment on these goals. We seek comment on four key areas regarding the regulatory fee process: (1) revising the way in which direct and indirect FTEs (full-time [employee]equivalents) are allocated; (2) using the current number of FTEs as the basis for calculating regulatory fee allocation percentages; (3) ameliorating the impact of fee increases that would otherwise result from using current FTE percentages, especially on entities providing international communication services; and (4) asking whether and how the current number of regulatory fee categories can be changed, for example, by adding broadband and/or by reducing the number of fee categories.

3. Section 9 of the Act states that the basis for calculating regulatory costs is the number of FTEs performing enforcement, policy and rulemaking, and international activities, as well as providing user information services. The Commission has historically regarded the costs generated by individuals working specifically on those activities as "direct" costs, whereas the cost of employees providing support efforts have been considered "indirect" costs. The Notice first seeks comment on whether to revise this approach. In order to provide a more consistent and workable way to allocate FTEs, we propose that all the direct and indirect FTEs in each of the four core licensing bureaus -- The Wireless Telecommunications, Wireline Competition, Media, and International Bureaus -- be allocated to the Bureau in which they work. Indirect FTEs outside the core bureaus would be allocated among the four core licensing bureaus in the percentage of each core bureau's direct FTEs to the total FTEs in the Commission.

4. Second, we seek comment on updating the current FTE allocation percentages to reflect the changes in the telecommunications industry and in the Commission's workload since the current percentages were developed in FY 1998. Using current FTE data to calculate regulatory fees instead of FY 1998 FTE data would produce substantial increases in the fees paid by International

²¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

²² 5 U.S.C. § 603(a).

²³ *Id.*

Bureau regulates and correspondingly substantial reduction in the fees currently paid by Interstate Telecommunications Service Providers (ITSPs, or wireline service providers), whereas fees paid by Wireless Bureau regulates would remain the same and Media Bureau regulatees would increase only slightly.

5. Third, we seek comment on whether and how we should ameliorate the impact increased fees would have on International Bureau regulatees. We ask whether the fact that FTEs in the International Bureau devote half their time to working on matters that directly benefit licensees in the remaining three core licensing bureaus would make it equitable to reallocate and redistribute half of the fee increases to those other bureaus. We also ask if there are other bureaus in which such a reallocation would be equitable.

6. Finally, we seek comment on whether the current number of fee categories in the Schedule of Regulatory fees should be expanded to include new services such as broadband, or reduced to reflect the state of the telecommunications market and to simplify the administration of the fee program. Because the statute directs the Commission to consider the benefits the payors receive from Commission regulation in setting regulatory fees, we seek comment on how better to measure the benefits on which licensees currently pay fees. For example, we seek comment on whether total revenues, or relative market share, would be good measures of the benefit payors receive from the work of the Commission to promote competition and remove barriers to market entry. Finally, we specifically seek comment on the Commission's statutory authority to implement any of these changes.

II. Background

III. Legal Basis:

7. This action, including publication of proposed rules, is authorized under Sections (4)(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended.²⁴

IV. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.²⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²⁷ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁸

²⁴ 47 U.S.C. §§ 154(i) and (j), 159, and 303(r).

²⁵ 5 U.S.C. § 603(b)(3).

²⁶ 5 U.S.C. § 601(6).

²⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²⁸ 15 U.S.C. § 632.

9. **Small Businesses.** Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.²⁹

10. **Small Businesses, Small Organizations, and Small Governmental Jurisdictions.** Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.³⁰ First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.³¹ In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”³² Nationwide, as of 2007, there were approximately 1,621,315 small organizations.³³ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁴ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.³⁵ We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”³⁶ Thus, we estimate that most governmental jurisdictions are small.

11. **Incumbent Local Exchange Carriers (Incumbent LECs).** Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁷ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 or more. According to

²⁹ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (accessed Jan. 2009).

³⁰ See 5 U.S.C. §§ 601(3)–(6).

³¹ See SBA, Office of Advocacy, “Frequently Asked Questions,” web.sba.gov/faqs (last visited May 6, 2011; figures are from 2009).

³² 5 U.S.C. § 601(4).

³³ INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

³⁴ 5 U.S.C. § 601(5).

³⁵ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007)

³⁶ The 2007 U.S. Census data for small governmental organizations indicate that there were 89,476 “Local Governments” in 2007. (U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428.) The criterion by which the size of such local governments is determined to be small is a population of 50,000. However, since the Census Bureau does not specifically apply that criterion, it cannot be determined with precision how many of such local governmental organizations is small. Nonetheless, the inference seems reasonable that substantial number of these governmental organizations has a population of less than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census’s Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of 50,000 many specific sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority is small. 36 13 C.F.R. § 121.201, NAICS code 517110.

Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.³⁸ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.³⁹ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the *NPRM*. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small providers.⁴⁰

12. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴¹ Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.⁴² According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁴³ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁴⁴ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁴⁵ In addition, 72 carriers have reported that they are Other Local Service Providers.⁴⁶ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.⁴⁷ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the *NPRM*.

13. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁸ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more

³⁸ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) ("*Trends in Telephone Service*").

³⁹ See *id.*

⁴⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁴¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁴² See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁴³ See *Trends in Telephone Service*, at tbl. 5.3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 13 C.F.R. § 121.201, NAICS code 517911.

than 1,000.⁴⁹ Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.⁵⁰ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.⁵¹ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

14. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵² Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1,000 employees and one operated with more than 1,000.⁵³ Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data,⁵⁴ 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

15. **Payphone Service Providers (PSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵⁵ Census Bureau data for 2007 shows that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these PSPs can be considered small entities.⁵⁶ According to Commission data,⁵⁷ 657 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 653 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

16. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵⁸ Census Bureau data for 2007

⁴⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁰ See *Trends in Telephone Service*, at tbl. 5.3.

⁵¹ *Id.*

⁵² 13 C.F.R. § 121.201, NAICS code 517911.

⁵³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁴ *Trends in Telephone Service*, at tbl. 5.3.

⁵⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁷ *Trends in Telephone Service*, at tbl. 5.3.

⁵⁸ 13 C.F.R. § 121.201, NAICS code 517110.

shows that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.⁵⁹ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.⁶⁰ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.⁶¹ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the NPRM.

17. **Operator Service Providers (OSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁶² Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.⁶³ According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.⁶⁴ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

18. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁶⁵ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.⁶⁶ Thus under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.⁶⁷ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.⁶⁸ Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Notice.

⁵⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-lds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁶⁰ See *Trends in Telephone Service*, at tbl. 5.3.

⁶¹ *Id.*

⁶² 13 C.F.R. § 121.201, NAICS code 517110.

⁶³ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-lds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

⁶⁴ *Trends in Telephone Service*, at tbl. 5.3.

⁶⁵ 13 C.F.R. § 121.201, NAICS code 517911.

⁶⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁶⁷ See *Trends in Telephone Service*, at tbl. 5.3.

⁶⁸ *Id.*

19. **800 and 800-Like Service Subscribers.**⁶⁹ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (“toll free”) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁰ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.⁷¹ Thus under this category and the associated small business size standard, the majority of resellers in this classification can be considered small entities. To focus specifically on the number of subscribers than on those firms which make subscription service available, the most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.⁷² According to our data for September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,888,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736. The Commission does not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, the Commission estimates that there are 7,860,000 or fewer small entity 800 subscribers; 5,888,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

20. **Satellite Telecommunications Providers.** Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.⁷³ The second has a size standard of \$25 million or less in annual receipts.⁷⁴

21. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”⁷⁵ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.⁷⁶ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.⁷⁷ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

⁶⁹ We include all toll-free number subscribers in this category, including those for 888 numbers.

⁷⁰ 13 C.F.R. § 121.201, NAICS code 517911.

⁷¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.

⁷² *Trends in Telephone Service*, at tbls. 18.4, 18.5, 18.6, 18.7.

⁷³ 13 C.F.R. § 121.201, NAICS code 517410.

⁷⁴ 13 C.F.R. § 121.201, NAICS code 517919.

⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

⁷⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁷⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

22. The second category, i.e. "All Other Telecommunications" comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."⁷⁸ For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.⁷⁹ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49, 999,999.⁸⁰ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

23. **Wireless Telecommunications Carriers (except satellite).** This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.⁸¹ The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers. The size standard for that category is that a business is small if it has 1,500 or fewer employees.⁸² Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁸³ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.⁸⁴ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁸⁵ Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers(except satellite) are small entities that may be affected by our proposed action.⁸⁶

24. **Licenses Assigned by Auctions.** Initially, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues

⁷⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

⁷⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁸⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

⁸¹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search>

⁸² 13 C.F.R. § 121.201, NAICS code 517210.

⁸³ 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁸⁴ U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

⁸⁵ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "100 employees or more."

⁸⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-_lang=en

are implicated.

25. **Paging Services.** Neither the SBA nor the FCC has developed a definition applicable exclusively to paging services. However, a variety of paging services is now categorized under Wireless Telecommunications Carriers (except satellite).⁸⁷ This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. Illustrative examples in the paging context include paging services, except satellite; two-way paging communications carriers, except satellite; and radio paging services communications carriers. The SBA has deemed a paging service in this category to be small if it has 1,500 or fewer employees.⁸⁸ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.⁸⁹ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁹⁰ Thus under this category and the associated small business size standard, the Commission estimates that the majority of paging services in the category of wireless telecommunications carriers(except satellite) are small entities that may be affected by our proposed action.⁹¹

26. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits.⁹² A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁹³ The SBA has approved this definition.⁹⁴ An initial auction of Metropolitan Economic Area (“MEA”) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.⁹⁵ Fifty-seven companies claiming small business status won 440 licenses.⁹⁶ A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁹⁷ One

⁸⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>

⁸⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”

⁸⁹ U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

⁹⁰ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees: the largest category provided is for firms with “100 employees or more.”

⁹¹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

⁹² *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (“*Paging Second Report and Order*”); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, ¶¶ 98-107 (1999).

⁹³ *Paging Second Report and Order*, 12 FCC Rcd at 2811, ¶ 179.

⁹⁴ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (“WTB”), FCC (Dec. 2, 1998) (“*Alvarez Letter 1998*”).

⁹⁵ See “929 and 931 MHz Paging Auction Closes,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁹⁶ See *id.*

⁹⁷ See “Lower and Upper Paging Band Auction Closes,” Public Notice, 16 FCC Rcd 21821 (WTB 2002).

hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁹⁸ A fourth auction of 9,603 lower and upper band paging licenses was held in the year 2010. 29 bidders claiming small or very small business status won 3,016 licenses.

27. **2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (“WCS”) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.⁹⁹ The SBA approved these definitions.¹⁰⁰ The Commission conducted an auction of geographic area licenses in the WCS service in 1997. In the auction, seven bidders that qualified as very small business entities won 31 licenses, and one bidder that qualified as a small business entity won a license.

28. **1670-1675 MHz Services.** This service can be used for fixed and mobile uses, except aeronautical mobile.¹⁰¹ An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a “small business” as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years, which would thus be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a “very small business” as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years, which would thus be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. The winning bidder was not a small entity.

29. **Wireless Telephony.** Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).¹⁰² Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁰³ Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁰⁴ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.¹⁰⁵

⁹⁸ See “Lower and Upper Paging Bands Auction Closes,” Public Notice, 18 FCC Red 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

⁹⁹ *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Red 10785, 10879, para. 194 (1997).

¹⁰⁰ See *Alvarez Letter 1998*.

¹⁰¹ 47 C.F.R. § 2.106; see generally 47 C.F.R. §§ 27.1–70.

¹⁰² 13 C.F.R. § 121.201, NAICS code 517210.

¹⁰³ *Id.*

¹⁰⁴ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

¹⁰⁵ *Trends in Telephone Service*, at tbl. 5.3.

Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁰⁶ Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁰⁷ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁰⁸ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

30. **Broadband Personal Communications Service.** *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous years.¹⁰⁹ For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three years.¹¹⁰ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹¹¹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small and very small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.¹¹² On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹¹³ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

31. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.¹¹⁴ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No.

¹⁰⁶ *Id.*

¹⁰⁷ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁰⁸ See *id.*

¹⁰⁹ See *Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7850-52 ¶¶ 57-60 (1996) ("PCS Report and Order"); see also 47 C.F.R. § 24.720(b).

¹¹⁰ See *PCS Report and Order*, 11 FCC Rcd at 7852 ¶ 60.

¹¹¹ See *Alvarez Letter 1998*.

¹¹² See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹¹³ See *C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Fourth Report and Order, 13 FCC Rcd 15743, 15768 ¶ 46 (1998).

¹¹⁴ See *C and F Block Broadband PCS Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.¹¹⁵ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹¹⁶ Of the 14 winning bidders in that auction, six claimed small business status and won 18 licenses.¹¹⁷ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.¹¹⁸ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹¹⁹

32. **Advanced Wireless Services.** In 2006, the Commission conducted its first auction of Advanced Wireless Services licenses in the 1710-1755 MHz and 2110-2155 MHz bands ("AWS-1"), designated as Auction 66.¹²⁰ For the AWS-1 bands, the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.¹²¹ In 2006, the Commission conducted its first auction of AWS-1 licenses.¹²² In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses won 142 licenses.¹²³ Twenty-six of the winning bidders identified themselves as small businesses and won 73 licenses.¹²⁴ In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.¹²⁵ Four winning bidders identified themselves as very small businesses, and three of the winning bidders identifying themselves as a small businesses won five AWS-1 licenses.¹²⁶

33. **Narrowband Personal Communications Services.** In 1994, the Commission

¹¹⁵ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Red 3703 (2005).

¹¹⁶ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Red 9247 (2007).

¹¹⁷ *Id.*

¹¹⁸ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Red 12749 (WTB 2008).

¹¹⁹ *Id.*

¹²⁰ See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Red 4562 (2006) ("Auction 66 Procedures Public Notice").

¹²¹ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Red 25,162, App. B (2003), modified by *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Red 14,058, App. C (2005).

¹²² See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Red 4562 (2006) ("Auction 66 Procedures Public Notice").

¹²³ See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Red 10,521 (2006) ("Auction 66 Closing Public Notice").

¹²⁴ See *id.*

¹²⁵ See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Red at 7499. Auction 78 also included an auction of broadband PCS licenses.

¹²⁶ See *Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period*, Public Notice, 23 FCC Red 12,749 (2008).

conducted two auctions of Narrowband PCS licenses. For these auctions, the Commission defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million.¹²⁷ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.¹²⁸ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹²⁹ A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.¹³⁰ A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.¹³¹ The SBA has approved these small business size standards.¹³² A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.¹³³ Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

34. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹³⁴ The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹³⁵ A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.¹³⁶ Additionally, the Lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area ("MSA/RSA") licenses — "entrepreneur" — which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.¹³⁷ The SBA approved these small size standards.¹³⁸ An auction of 740 licenses was conducted in 2002 (one license in each of the 734

¹²⁷ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Red 175, 196, para. 46 (1994).

¹²⁸ See "Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674," *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses, Winning Bids Total \$490,901,787," *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

¹²⁹ *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Red 10456, 10476, para. 40 (2000) ("Narrowband PCS Second Report and Order").

¹³⁰ *Narrowband PCS Second Report and Order*, 15 FCC Red at 10476, para. 40.

¹³¹ *Id.*

¹³² See *Alvarez Letter 1998*.

¹³³ See "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Red 18663 (WTB 2001).

¹³⁴ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Red 1022 (2002) ("Channels 52-59 Report and Order").

¹³⁵ See *Channels 52-59 Report and Order*, 17 FCC Red at 1087-88, ¶ 172.

¹³⁶ See *id.*

¹³⁷ See *id.* 17 FCC Red at 1088, ¶ 173.

¹³⁸ See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) ("Alvarez Letter 1999").

MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.¹³⁹ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.¹⁴⁰ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.¹⁴¹ In 2005, the Commission completed an auction of 5 licenses in the lower 700 MHz band (Auction 60). All three winning bidders claimed small business status.

35. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.¹⁴² An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.¹⁴³ Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.

36. **Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.¹⁴⁴ On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.¹⁴⁵ The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

37. **700 MHz Guard Band Licenses.** In 2000, the Commission adopted the *700 MHz Guard Band Report and Order*, in which it established rules for the A and B block licenses in the Upper 700 MHz band, including size standards for “small businesses” and “very small businesses” for purposes

¹³⁹ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

¹⁴⁰ See Lower 700 MHz Band Auction Closes, *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

¹⁴¹ See *id.*

¹⁴² Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, WT Docket No. 01-309, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket No. 03-264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 06-169, *Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (“*700 MHz Second Report and Order*”).

¹⁴³ See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

¹⁴⁴ *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

¹⁴⁵ See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

of determining their eligibility for special provisions such as bidding credits.¹⁴⁶ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.¹⁴⁷ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.¹⁴⁸ SBA approval of these definitions is not required.¹⁴⁹ An auction of these licenses was conducted in 2000.¹⁵⁰ Of the 104 licenses auctioned, 96 licenses were won by nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses was held in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.¹⁵¹

38. **Specialized Mobile Radio.** The Commission adopted small business size standards for the purpose of determining eligibility for bidding credits in auctions of Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands. The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁵² The Commission defined a "very small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$3 million for the preceding three years.¹⁵³ The SBA has approved these small business size standards for both the 800 MHz and 900 MHz SMR Service.¹⁵⁴ The first 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 licenses in the 900 MHz SMR band. In 2004, the Commission held a second auction of 900 MHz SMR licenses and three winning bidders identifying themselves as very small businesses won 7 licenses.¹⁵⁵ The auction of 800 MHz SMR licenses for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small or very small businesses under the \$15 million size standard won 38 licenses for the upper 200 channels.¹⁵⁶ A second auction of 800 MHz SMR licenses was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business

¹⁴⁶ See *Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Red 5299 (2000) ("700 MHz Guard Band Report and Order").

¹⁴⁷ See *700 MHz Guard Band Report and Order*, 15 FCC Red at 5343, para. 108.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*, 15 FCC Red 5299, 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

¹⁵⁰ See "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 15 FCC Red 18026 (2000).

¹⁵¹ See "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 16 FCC Red 4590 (WTB 2001).

¹⁵² 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

¹⁵³ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

¹⁵⁴ See *Alvarez Letter 1999*.

¹⁵⁵ See 900 MHz Specialized Mobile Radio Service Spectrum Auction Closes: Winning Bidders Announced," *Public Notice*, 19 FCC Red. 3921 (WTB 2004).

¹⁵⁶ See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Red 18367 (WTB 1996).

status won five licenses.¹⁵⁷

39. The auction of the 1,053 800 MHz SMR licenses for the General Category channels was conducted in 2000. Eleven bidders who won 108 licenses for the General Category channels in the 800 MHz SMR band qualified as small or very small businesses.¹⁵⁸ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.¹⁵⁹ Of the 22 winning bidders, 19 claimed small or very small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed to be small businesses.

40. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues not exceeding \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.¹⁶⁰ We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

41. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁶¹ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹⁶² Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

42. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service licenses are assigned by auction, where mutually exclusive applications are accepted. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of

¹⁵⁷ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Red 1446 (WTB 2002).

¹⁵⁸ See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Red 17162 (2000).

¹⁵⁹ See, “800 MHz SMR Service Lower 80 Channels Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Red 1736 (2000).

¹⁶⁰ See generally 13 C.F.R. § 121.201, NAICS code 517210.

¹⁶¹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

¹⁶² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

determining their eligibility for special provisions such as bidding credits.¹⁶³ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁶⁴ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.¹⁶⁵ The SBA has approved these small size standards.¹⁶⁶ Auctions of Phase II licenses commenced on and closed in 1998.¹⁶⁷ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.¹⁶⁸ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.¹⁶⁹ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.¹⁷⁰ In 2007, the Commission conducted a fourth auction of the 220 MHz licenses, designated as Auction 72.¹⁷¹ Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.¹⁷² In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

43. **Private Land Mobile Radio (“PLMR”).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.¹⁷³ The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have

¹⁶³ *Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

¹⁶⁴ *Id.* at 11068 ¶ 291.

¹⁶⁵ *Id.*

¹⁶⁶ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

¹⁶⁷ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

¹⁶⁸ See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

¹⁶⁹ See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

¹⁷⁰ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

¹⁷¹ See “Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72, *Public Notice*, 22 FCC Rcd 3404 (2007).

¹⁷² See *Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period*, Public Notice, 22 FCC Rcd 11573 (2007).

¹⁷³ See 13 C.F.R. § 121.201, NAICS code 517210.

information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.¹⁷⁴

44. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

45. **Fixed Microwave Services.** Microwave services include common carrier,¹⁷⁵ private-operational fixed,¹⁷⁶ and broadcast auxiliary radio services.¹⁷⁷ They also include the Local Multipoint Distribution Service ("LMDS"),¹⁷⁸ the Digital Electronic Message Service ("DEMS"),¹⁷⁹ and the 24 GHz Service,¹⁸⁰ where licensees can choose between common carrier and non-common carrier status.¹⁸¹ The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.¹⁸² For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁸³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

46. **39 GHz Service.** The Commission adopted small business size standards for 39 GHz licenses. A "small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million in the preceding three years.¹⁸⁴ A "very

¹⁷⁴ See generally 13 C.F.R. § 121.201.

¹⁷⁵ See 47 C.F.R. Part 101, Subparts C and I.

¹⁷⁶ See *id.* Subparts C and H.

¹⁷⁷ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

¹⁷⁸ See 47 C.F.R. Part 101, Subpart L.

¹⁷⁹ See *id.* Subpart G.

¹⁸⁰ See *id.*

¹⁸¹ See 47 C.F.R. §§ 101.533, 101.1017.

¹⁸² 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSZ5&-_lang=en.

¹⁸⁴ See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Red 18600 (1997).

small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues of not more than \$15 million for the preceding three years.¹⁸⁵ The SBA has approved these small business size standards.¹⁸⁶ In 2000, the Commission conducted an auction of 2,173 39 GHz licenses. A total of 18 bidders who claimed small or very small business status won 849 licenses.

47. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.¹⁸⁷ The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous years.¹⁸⁸ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three years.¹⁸⁹ The SBA has approved these small business size standards in the context of LMDS auctions.¹⁹⁰ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses: there were 32 small and very small businesses winning that won 119 licenses.

48. **218-219 MHz Service.** The first auction of 218-219 MHz Service (previously referred to as the Interactive and Video Data Service or IVDS) licenses resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas ("MSAs").¹⁹¹ Of the 594 licenses, 557 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.¹⁹² In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, the Commission revised its small business size standards for the 218-219 MHz Service and defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.¹⁹³ The Commission defined a "very small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual

¹⁸⁵ *Id.*

¹⁸⁶ See Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); see Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

¹⁸⁷ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) ("LMDS Second Report and Order").

¹⁸⁸ See LMDS Second Report and Order, 12 FCC Rcd at 12689-90, para. 348.

¹⁸⁹ See *id.*

¹⁹⁰ See Alvarez to Phythyon Letter 1998.

¹⁹¹ See "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," Public Notice, 9 FCC Rcd 6227 (1994).

¹⁹² *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

¹⁹³ *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

gross revenues not exceeding \$3 million for the preceding three years.¹⁹⁴ The SBA has approved these definitions.¹⁹⁵

49. **Location and Monitoring Service (“LMS”).** Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For auctions of LMS licenses, the Commission has defined a “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁹⁶ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million.¹⁹⁷ These definitions have been approved by the SBA.¹⁹⁸ An auction of LMS licenses was conducted in 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

50. **Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.¹⁹⁹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).²⁰⁰ For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),²⁰¹ which is 1,500 or fewer employees.²⁰² Census data for 2007 shows that there were 1,383 firms that operated that year.²⁰³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

51. **Air-Ground Radiotelephone Service.**²⁰³ The Commission has previously used the SBA’s small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.²⁰⁴ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding

¹⁹⁴ *Id.*

¹⁹⁵ See Alvarez to Phythyon Letter 1998.

¹⁹⁶ Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, Second Report and Order, 13 FCC Rcd 15182, 15192, ¶ 20 (1998) (“Automatic Vehicle Monitoring Systems Second Report and Order”); see also 47 C.F.R. § 90.1103.

¹⁹⁷ Automatic Vehicle Monitoring Systems Second Report and Order, 13 FCC Rcd at 15192, para. 20; see also 47 C.F.R. § 90.1103.

¹⁹⁸ See Alvarez Letter 1998.

¹⁹⁹ The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²⁰⁰ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²⁰¹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁰² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/H3QTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁰³ The service is defined in § 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²⁰⁴ 13 C.F.R. § 121.201, NAICS codes 517210.

three years not exceeding \$40 million.²⁰⁵ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.²⁰⁶ These definitions were approved by the SBA.²⁰⁷ In 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction 65). The auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

52. **Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (“VHF”) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²⁰⁸ Census data for 2007 shows that there were 1,383 firms that operated that year.²⁰⁹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

53. **Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.²¹⁰ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard,²¹¹ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²¹² Census data for 2007 shows that there were 1,383 firms that operated that year.²¹³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

²⁰⁵ *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103 and 05-42, Order on Reconsideration and Report and Order, 20 FCC Red 19663, ¶¶ 28-42 (2005).

²⁰⁶ *Id.*

²⁰⁷ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

²⁰⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²⁰⁹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²¹⁰ This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²¹¹ 13 C.F.R. § 121.201, NAICS code 517210.

²¹² *Id.*

²¹³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

54. **Multiple Address Systems ("MAS").** Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. The Commission defines a small business for MAS licenses as an entity that has average gross revenues of less than \$15 million in the preceding three years.²¹⁴ A very small business is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three years.²¹⁵ The SBA has approved these definitions.²¹⁶ The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of March 5, 2010, there were over 11,500 MAS station authorizations. In 2001, an auction of 5,104 MAS licenses in 176 EAs was conducted.²¹⁷ Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

55. With respect to entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.²¹⁸ The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

56. **1.4 GHz Band Licensees.** The Commission conducted an auction of 64 1.4 GHz band licenses in the paired 1392-1395 MHz and 1432-1435 MHz bands, and in the unpaired 1390-1392 MHz band in 2007.²¹⁹ For these licenses, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, had average gross revenues not exceeding \$40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years.²²⁰ Neither of the two winning bidders claimed small business status.²²¹

57. **Incumbent 24 GHz Licensees.** This analysis may affect incumbent licensees who

²¹⁴ See *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Red 11956, 12008, ¶ 123 (2000).

²¹⁵ *Id.*

²¹⁶ See *Alvarez Letter 1999*.

²¹⁷ See "Multiple Address Systems Spectrum Auction Closes," Public Notice, 16 FCC Red 21011 (2001).

²¹⁸ See 13 C.F.R. § 121.201, NAICS code 517210.

²¹⁹ See "Auction of 1.4 GHz Band Licenses Scheduled for February 7, 2007," Public Notice, 21 FCC Red 12393 (W1B 2006); "Auction of 1.4 GHz Band Licenses Closes: Winning Bidders Announced for Auction No. 69," Public Notice, 22 FCC Red 4714 (2007) ("Auction No. 69 Closing PV").

²²⁰ *Auction No. 69 Closing PV*, Attachment C.

²²¹ See *Auction No. 69 Closing PV*.

were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²²² To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²²³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census’ use of the classifications “firms” does not track the number of “licenses”. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent²²⁴ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

58. **Future 24 GHz Licensees.** With respect to new applicants for licenses in the 24 GHz band, for the purpose of determining eligibility for bidding credits, the Commission established three small business definitions. An “entrepreneur” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$40 million.²²⁵ A “small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.²²⁶ A “very small business” in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²²⁷ The SBA has approved these small business size standards.²²⁸ In a 2004 auction of 24 GHz licenses, three winning bidders won seven licenses.²²⁹ Two of the winning bidders were very small businesses that won five licenses.

59. **Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video

²²² 13 C.F.R. § 121.201. NAICS code 517210.

²²³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSZ5&-_lang=en.

²²⁴ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

²²⁵ *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Red 16934, 16967 ¶ 77 (2000) (“24 GHz Report and Order”); see also 47 C.F.R. § 101.538(a)(3).

²²⁶ *24 GHz Report and Order*, 15 FCC Red at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(2).

²²⁷ *24 GHz Report and Order*, 15 FCC Red at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(1).

²²⁸ See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

²²⁹ *Auction of 24 GHz Service Spectrum Auction Closes, Winning Bidders Announced for Auction 56, Down Payments Due August 16, 2004, Final Payments Due August 30, 2004, Ten-Day Petition to Deny Period*, Public Notice, 19 FCC Red 14738 (2004).

programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).²³⁰ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three years.²³¹ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.²³² After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.²³³ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.²³⁴ Auction 86 concluded in 2009 with the sale of 61 licenses.²³⁵ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

60. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²³⁶ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television

²³⁰ *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Red 9589, 9593 ¶ 7 (1995).

²³¹ 47 C.F.R. § 21.961(b)(1).

²³² 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

²³³ *Auction of Broadband Radio Service (BRS) Licenses. Scheduled for October 27, 2009. Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Red 8277 (2009).

²³⁴ *Id.* at 8296.

²³⁵ *Auction of Broadband Radio Service Licenses Closes. Winning Bidders Announced for Auction 86. Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Red 13572 (2009).

²³⁶ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²³⁷ For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²³⁸ To gauge small business prevalence for these cable services we must, however, use the most current census data. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.²³⁹ Of this total, 939 firms employed 999 or fewer employees, and 16 firms employed 1,000 employees or more.²⁴⁰ Thus, the majority of these firms can be considered small.

61. **Television Broadcasting.** This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."²⁴¹ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.²⁴² The Commission has estimated the number of licensed commercial television stations to be 1,387.²⁴³ In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.²⁴⁴ We therefore estimate that the majority of commercial television broadcasters are small entities.

62. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations²⁴⁵ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on

²³⁷ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²³⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²³⁹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment - Size of Firms for the United States: 2007, NAICS code 5171102 (issued November 2010).

²⁴⁰ *Id.*

²⁴¹ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

²⁴² 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2010).

²⁴³ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2011," dated January 6, 2012; http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.pdf.

²⁴⁴ We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

²⁴⁵ "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 21.103(a)(1).

this basis and is therefore possibly over-inclusive to that extent.

63. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.²⁴⁶ These stations are non-profit, and therefore considered to be small entities.²⁴⁷

64. In addition, there are also 2,528 low power television stations, including Class A stations (LPTV).²⁴⁸ Given the nature of these services, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

65. **Radio Broadcasting.** This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”²⁴⁹ The SBA has established a small business size standard for this category, which is: such firms having \$7 million or less in annual receipts.²⁵⁰ According to Commission staff review of BIA Advisory Services, LLC’s *Media Access Pro Radio Database* on March 28, 2012, about 10,759 (97%) of 11,102 commercial radio stations had revenues of \$7 million or less. Therefore, the majority of such entities are small entities.

66. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.²⁵¹ In addition, to be determined to be a “small business,” the entity may not be dominant in its field of operation.²⁵² We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

67. **Auxiliary, Special Broadcast and Other Program Distribution Services.** This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.²⁵³

68. The Commission estimates that there are approximately 6,099 FM translators and boosters.²⁵⁴ The Commission does not collect financial information on any broadcast facility, and the

²⁴⁶ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

²⁴⁷ See generally 5 U.S.C. §§ 601(4), (6).

²⁴⁸ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

²⁴⁹ U.S. Census Bureau, 2007 NAICS Definitions, “515112 Radio Stations”: <http://www.census.gov/naics/2007/def/ND515112.111M#N515112>.

²⁵⁰ 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2010).

²⁵¹ “Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.” 13 C.F.R. § 121.103(a)(1) (an SBA regulation).

²⁵² 13 C.F.R. § 121.102(b) (an SBA regulation).

²⁵³ 13 C.F.R. 121.201, NAICS codes 515112 and 515120.

²⁵⁴ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 6, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (\$7.0 million for a radio station or \$14.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a "small business concern" because they are not independently owned and operated.²⁵⁵

69. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²⁵⁶ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁵⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

70. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁵⁸ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁵⁹ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁶⁰ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²⁶¹ Thus, under this second size standard, most cable systems are small.

71. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or

²⁵⁵ See 15 U.S.C. § 632.

²⁵⁶ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Oct. 21, 2009).

²⁵⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTTable?_bm=y&-geo_id=&-ids_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁵⁸ 47 C.F.R. § 76.901(c). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Red 7393, 7408 (1995).

²⁵⁹ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁶⁰ 47 C.F.R. § 76.901(c).

²⁶¹ Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁶² The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁶³ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁶⁴ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁶⁵ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

72. **Open Video Systems.** Open Video Service (OVS) systems provide subscription services.²⁶⁶ The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.²⁶⁷ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁶⁸ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁶⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.²⁷⁰ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁷¹ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS

²⁶² 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁶³ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²⁶⁴ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

²⁶⁵ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

²⁶⁶ See 47 U.S.C. § 573.

²⁶⁷ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Red at 606, ¶ 135.

²⁶⁸ See 47 U.S.C. § 573.

²⁶⁹ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/dcl/ND517110.HTM#N517110>.

²⁷⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁷¹ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

franchises.²⁷² The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.²⁷³ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

73. Cable Television Relay Service. The industry in which Cable Television Relay Services operate comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.²⁷⁴ The category designated by the SBA for this industry is "Wired Telecommunications Carriers."²⁷⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, Census data for 2007 shows 3,188 firms in this category.²⁷⁶ Of these 3,188 firms, only 44 had 1,000 or more employees. While we could not find precise Census data on the number of firms with in the group with 1,500 or fewer employees, it is clear that at least 3,144 firms with fewer than 1,000 employees would be in that group. On this basis, the Commission estimates that a substantial majority of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category, are small.²⁷⁷

74. Multichannel Video Distribution and Data Service. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special

²⁷² See *13th Annual Report*, 24 FCC Rcd at 606-07 ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁷³ See <http://www.fcc.gov/mb/ovs/csovsccr.html> (current as of February 2007).

²⁷⁴ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition): <http://www.census.gov/naics/2007/def/ND517110111M/N517110>.

²⁷⁵ 13 C.F.R. § 121.201, NAICS code 517110.

²⁷⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁷⁷ *Id.* As noted in para. 18 above with regard to the distinction between manufacturers of equipment used to provide interconnected VoIP and manufactures of equipment to provide non-interconnected VoIP, our estimates of the number of the number of providers of non-interconnected VoIP (and the number of small entities within that group) are likely overstated because we could not draw in the data a distinction between such providers and those that provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time.

provisions such as bidding credits. It defines a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.²⁷⁸ These definitions were approved by the SBA.²⁷⁹ On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.²⁸⁰ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.²⁸¹

75. **Amateur Radio Service.** These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

76. **Personal Radio Services.** Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.²⁸² These services include Citizen Band Radio Service ("CB"), General Mobile Radio Service ("GMRS"), Radio Control Radio Service ("R/C"), Family Radio Service ("FRS"), Wireless Medical Telemetry Service ("WMTS"), Medical Implant Communications Service ("MICS"), Low Power Radio Service ("LPRS"), and Multi-Use Radio Service ("MURS").²⁸³ There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.²⁸⁴ Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities

²⁷⁸ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range: Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2-12.7 GHz Band.* ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, ¶ 252 (2002).

²⁷⁹ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 13, 2002).

²⁸⁰ See "Multichannel Video Distribution and Data Service Auction Closes," Public Notice, 19 FCC Rcd 1834 (2004).

²⁸¹ See "Auction of Multichannel Video Distribution and Data Service Licenses Closes: Winning Bidders Announced for Auction No. 63," Public Notice, 20 FCC Rcd 19807 (2005).

²⁸² 47 C.F.R. part 90.

²⁸³ The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of part 95 of the Commission's rules. See generally 47 C.F.R. part 95.

²⁸⁴ 13 C.F.R. § 121.201, NAICS Code 517210.

under an SBA definition that might be directly affected by our action.

77. **Public Safety Radio Services.** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.²⁸⁵ There are a total of approximately 127,540 licensees in these services. Governmental entities²⁸⁶ as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.²⁸⁷

78. **Internet Service Providers.** *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business economic census categories. They are (1) Internet Publishing and Broadcasting and Web Search Portals,²⁸⁸ and (2) All Other Information Services.²⁸⁹

79. **Internet Service Providers.** The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,²⁹⁰ which has an SBA small business size standard of 1,500 or fewer employees.²⁹¹ These are also labeled "broadband." The latter are within the category of All Other Telecommunications,²⁹² which has a size standard of annual receipts of \$25 million or less.²⁹³ These are labeled non-broadband.

²⁸⁵ With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15-90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed for highway maintenance service to provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service ("EMRS") use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15-90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33-90.55.

²⁸⁶ 47 C.F.R. § 1.1162.

²⁸⁷ 5 U.S.C. § 601(5).

²⁸⁸ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

²⁸⁹ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

²⁹⁰ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁹¹ 13 C.F.R. § 121.201, NAICS code 517110.

²⁹² U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

²⁹³ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

80. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.²⁹⁴ For the second category, the data show that 1,682 firms operated for the entire year.²⁹⁵ Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

81. **Internet Publishing and Broadcasting and Web Search Portals.** This industry comprises establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.²⁹⁶ The SBA deems businesses in this industry with 500 or fewer employees small.²⁹⁷ According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with to 999 employees.²⁹⁸ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

V. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

82. This *Notice of Proposed Rulemaking* does not propose any changes to the Commission's current compliance rules, but may include possible proposed information collection, reporting, and recordkeeping requirements.

VI. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

83. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁹⁹

²⁹⁴ U.S. Census Bureau. 2007 Economic Census. Subject Series: Information, "Establishment and Firm Size." NAICS code 5171103 (rel. Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1-4 employees and for 5-9 employees.

²⁹⁵ U.S. Census Bureau. 2007 Economic Census. Subject Series: Information, "Establishment and Firm Size." NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

²⁹⁶ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

²⁹⁷ http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

²⁹⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

²⁹⁹ 5 U.S.C. § 603.

84. In Section I of this *NPRM*, we seek comment on whether and how the Commission should adjust the revised cost allocation percentages that would otherwise result from using updated FTE data and implementing the new cost allocation proposals.

85. In particular, as stated *supra* in Section I, our concern with minimizing any adverse economic impact of our proposed rules on small entities is guided by our goals of fairness, administrability, and sustainability. Accordingly, we believe that adjustments to fees paid by fee payors should be consistent with those goals. Specifically, we intend to mitigate any inequities that might result from imposition of substantial fee increases.

86. In keeping with the requirements of the Regulatory Flexibility Act, we have considered certain alternative means of mitigating the effects of fee increases to a particular industry segment. One option is to make all or most fee adjustments at one time. Another option is to provide interim adjustments, by phasing in the new fees over a period of time.

87. On the issue of revisiting the allocation resulting from this rulemaking, the Commission is considering undertaking this reexamination at regular intervals. Alternatively, such reexamination could be undertaken in response to comments by fee payors in the annual regulatory fee collection *NPRM*. Regardless of the method chosen, one underlying concern we have is to mitigate any adverse economic impact on small service providers who are likely least able to absorb unpredictable changes in fees from year to year.

88. In light of our stated goals, the Commission seeks comment on the abovementioned, and any other, means and methods that would minimize any significant economic impact of our proposed rules on small entities.

VII. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules:

89. None.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

*Re: In the Matter of Procedures for Assessment and Collection of
Regulatory Fees.* MD Docket No. 12-201, Notice of Proposed Rulemaking

I am pleased that the Commission is seeking additional comments on ways to modify our regulatory fee structure – a reform which is long overdue. As I have said many times in the past, the Commission should update its fee structure to ensure that they are levied not only in a fiscally prudent manner, but in a nondiscriminatory and competitively neutral way as well.

I look forward to working with my colleagues and all stakeholders as we assess ways to reform our out-dated methodology. Also, I will pay special attention to ensuring that the Commission has solid legal authority for any ultimate reform measures that it approves. I thank the Chairman for his continued work on this matter as well as our terrific staff in the managing director's office and bureaus.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Procedures for Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2008, MD Docket Nos. 12-201, 08-65, Notice of Proposed Rulemaking

Fourteen years have passed since the Commission last realigned its regulatory fees to reflect changes in the communications marketplace. Needless to say, there have been many more changes since then. In 1998, each industry segment largely still played in its own sandbox—telephone companies offered telephone service, cable operators offered cable television, and so on. But today's currency is convergence: Telephone companies have entered the video market, cable operators are winning voice customers, satellite operators offer competitive radio, television, and broadband services, and wireless providers have unleashed a mobile revolution few if any saw coming.

The Commission must strive to keep pace with this swiftly changing industry—especially when, as here, Congress has affirmatively told us to do so in Section 9 of the Communications Act. I look forward to hearing from all interested parties about how we can update our regulatory fee structure to better reflect the current marketplace, and I accordingly support this Notice of Proposed Rulemaking.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
)	
Tennis Channel, Inc.,	)	MB Docket No. 10-204
Complainant,)	
	)	File No. CSR-8258-P
v.)	
)	
Comcast Cable Communications, L.L.C.,)	
Defendant)	

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2012

Released: July 24, 2012

By the Commission: Commissioners McDowell and Pai dissenting and issuing a joint statement.

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I. INTRODUCTION AND SUMMARY

1. This proceeding arises from a July 5, 2010 complaint by Tennis Channel Inc. (“Tennis Channel”), a video programming vendor, against Comcast Cable Communications, LLC. (“Comcast”), a multichannel video programming distributor (“MVPD”). Tennis Channel alleges that Comcast discriminates against Tennis Channel on the basis of affiliation in violation of the Communications Act and Commission rules. It alleges that Comcast carries Tennis Channel, with which Comcast is not affiliated, on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge.

2. On December 16, 2011, following a full evidentiary hearing, an Administrative Law Judge (ALJ) issued an Initial Decision that found that “under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that [Comcast] discriminated against Tennis Channel . . . on the basis of affiliation, and that this discrimination had the effect of restraining Tennis Channel’s ability to compete fairly in violation of section 616 of the Act and Section 76.1301(c) of the Commission’s rules.”¹ As relief, the ALJ ordered Comcast to pay a forfeiture of \$375,000 and required Comcast to carry Tennis Channel at the same level of distribution as Golf Channel and Versus, although Comcast would retain “full discretion in determining the level of penetration it chooses to carry the three channels.”² The ALJ also required Comcast to provide Tennis Channel with equitable treatment as to channel placement.³ On January 19, 2012, Comcast filed Exceptions to the Initial Decision and appealed the Initial Decision to the Commission.⁴ On the same day, Comcast filed an Application for Review of a determination by the Media Bureau that Tennis Channel’s complaint was not barred by the statute of limitations.⁵

3. For the reasons explained below, we deny Comcast’s Application for Review. We also deny Comcast’s Exceptions other than its Exception to the ALJ’s equitable channel placement remedy. We vacate the equitable channel placement remedy and affirm the ALJ’s order in all other respects.

¹ *Tennis Channel, Inc. v. Comcast Cable Communications*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 26 FCC Red 17160, 17204 ¶ 101 (ALJ Dec. 20, 2011) (“Initial Decision”).

² *Id.* at 17213, 17211; ¶¶ 125-26, ¶ 119.

³ *Id.* at 17211-12 ¶ 120.

⁴ Comcast Cable Communications, LLC, Exceptions to Initial Decision, MB Docket No. 10-204, File No. CSR 8258-P (filed Jan. 19, 2012).

⁵ Comcast Cable Communications, LLC, Application for Review, MB Docket No. 10-204, File No. CSR 8258-P (filed Jan. 19, 2012).

II. BACKGROUND

A. The Statute and Regulations

4. Section 616 of the Communications Act requires the Commission to “establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors.”⁶ These regulations shall “contain provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”⁷ “[T]he term ‘affiliate’, when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.”⁸

5. To satisfy the requirements of Section 616, the Commission adopted 47 C.F.R. § 76.1301(c).⁹ This rule tracks Section 616 and restricts MVPDs from engaging in “conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”¹⁰ The Commission identifies discriminatory behavior on a case-by-case basis “because the practices at issue . . . necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.”¹¹

6. Section 76.1301(c) also sets forth procedures for resolving program carriage complaints under Section 616. In filing a complaint, the burden of proof is placed on the programming vendor to “establish a *prima facie* showing that the defendant [MVPD] has engaged in behavior that is prohibited by Section 616.”¹² The Commission anticipated that “most program carriage complaints [would] require an administrative hearing to evaluate contested facts related to the parties’ specific negotiations.”¹³ After reviewing a complaint, answer, and reply, Commission staff determines whether a *prima facie* case of a violation has been made.¹⁴ If a *prima facie* case has been made and the matter cannot be resolved on the

⁶ 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁷ 47 U.S.C. § 536(a)(3).

⁸ 47 U.S.C. § 522(2).

⁹ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642 (1993) (“*Second Report and Order*”); see also *Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994).

¹⁰ 47 C.F.R. § 76.1301(c).

¹¹ *Second Report and Order*, 9 FCC Rcd at 2648 ¶ 14.

¹² *Id.* at 2654 ¶ 29.

¹³ *Id.* at 2652 ¶ 24.

¹⁴ *Id.* at 2655 ¶ 31.

sole basis of a limited written record, Commission staff is to “inform the parties of its determination that resolution of the complaint will require a hearing before an [ALJ].”¹⁵ The parties are given the option to resolve the dispute through the Commission’s alternative dispute resolution process or be heard by the ALJ.¹⁶ Decisions rendered by the ALJ are directly appealable to the Commission.¹⁷ Appropriate relief for program carriage violations is determined “on a case-by-case basis.”¹⁸ Complaints are expected to include a request for relief, accompanied by relevant evidence and arguments in support of that relief.¹⁹ The Commission conceived the available remedies and sanctions to include “forfeitures, mandatory carriage, [and] carriage on terms revised or specified by the Commission.”²⁰

7. On August 1, 2011, the Commission released a *Second Report and Order and Notice of Proposed Rulemaking*,²¹ codifying some procedures and rules for Section 616 program carriage disputes and seeking comment on others. The Program Carriage Order and NPRM was issued after the hearing in this case, and therefore did not apply to the proceeding before the ALJ.

B. Tennis Channel’s Complaint

8. Tennis Channel is a national sports network vendor that launched on May 15, 2003 with a broad range of programming focusing on tennis and tennis-related programming.²² It is the only cable network in the nation dedicated to covering tennis.²³ Tennis Channel carried exclusive telecast of portions of three of the four Grand Slam tournaments in 2008 and added portions of the fourth Grand Slam tournament, exclusive telecasts of every Davis Cup and Fed Cup match, and other prominent tennis events in 2009, resulting in year-round tennis event coverage.²⁴ Tennis Channel also offers non-event tennis-related content such as “hundreds of original lifestyle, instructional, and fitness series, specials, and short-form programs.”²⁵ Approximately [REDACTED] subscribers receive Tennis Channel from about

¹⁵ *Id.* at 2652 ¶ 24.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2653 ¶ 26.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage. Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494 (2011) (“Program Carriage Order and NPRM”), appeal docketed sub nom. Time Warner Cable Inc. v. FCC, No. 11-4138 (2nd Cir. Oct. 11, 2011).

²² *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at 2 ¶ 5 (Testimony of Ken Solomon).

²³ *Id.*

²⁴ See *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at Exhibit B (Testimony of Ken Solomon).

²⁵ Tennis Channel Exh. 14 at 3 ¶ 6 (Testimony of Ken Solomon).

130 different distributors nationwide.²⁶

9. Comcast is the largest MVPD in the United States²⁷ with approximately 23 million subscribers.²⁸ It owns an equity interest in sports networks, including a controlling interest in Golf Channel and Versus, two networks at issue in this dispute.²⁹

10. Golf Channel is a cable sports network that launched in 1995 and focuses on golf-related programming.³⁰ It carries many golf tournaments, including Professional Golf Association Tour events, Champions Tour events, Nationwide Tour events, Ladies Professional Golf Association Tour events, and United States Golf Association tour events.³¹ Golf Channel also offers non-event golf-related content such as news, interviews, comedy, and instructional programming.³²

11. Versus is also a cable sports network that launched in 1995.³³ It carries a variety of sports programming including hockey, college football and basketball, bull riding, car races, lacrosse, hunting, fishing, professional basketball, martial arts, minor league baseball, skiing, snowboarding, volleyball, diving, World Extreme Cagefighting, triathlon, and bicycling.³⁴ Versus also offers non-event content.³⁵

²⁶ *Initial Decision*, 26 FCC Red at 17163 ¶ 5; Tennis Channel Exh. 14 at 3 ¶ 8 (Testimony of Ken Solomon). The ALJ issued three protective orders in this proceeding. The first is intended to protect trade secrets and other commercially sensitive confidential information contained in the documents exchanged by the parties, as well as the documents and testimony in this proceeding. See *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Protective Order, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Dec. 20, 2010) ("First Protective Order"). The second is intended to facilitate the use in this proceeding of commercially sensitive information that The Nielsen Company considers confidential. See *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Second Protective Order, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Apr. 27, 2011) ("Second Protective Order"). The third is intended to allow the parties to disclose documents in this proceeding that have continuing value to The Nielsen Company, subject to certain terms and conditions. See *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Stipulation and Third Protective Order Concerning Use of Covered Information, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Apr. 27, 2011) ("Third Protective Order"). In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the First Protective Order, the Second Protective Order, and the Third Protective Order. The unredacted version of this Order will be available upon request to qualified persons who execute and file with the Commission the signed acknowledgements required by the protective orders in this proceeding.

²⁷ *Initial Decision*, 26 FCC Red at 17163 ¶ 7; Tennis Channel Exh. 16 at 69 ¶ 101 (Testimony of Hal Singer).

²⁸ *Initial Decision*, 26 FCC Red at 17163 ¶ 7; Tr. 1989, 1991 (Madison Bond).

²⁹ *Initial Decision*, 26 FCC Red at 17163-64 ¶ 7; Tennis Channel Exh. 16 at 11 ¶ 21 & n.19 (Testimony of Hal Singer). At the time when Comcast rejected Tennis Channel's carriage proposal, Comcast owned Golf Channel and Versus in whole. Tennis Channel Exh. 16 at 11 ¶ 21 & n.19 (Testimony of Hal Singer).

³⁰ *Initial Decision*, 26 FCC Red at 17164 ¶ 8; Comcast Exh. 77 at 18-19 ¶ 30 (Testimony of Michael Egan).

³¹ *Id.*

³² *Initial Decision*, 26 FCC Red at 17164 ¶ 8; Comcast Exh. 77 at 19 ¶ 31 (Testimony of Michael Egan).

³³ *Initial Decision*, 26 FCC Red at 17164 ¶ 9; Tr. 1955-56 (Madison Bond).

³⁴ *Initial Decision*, 26 FCC Red at 17164 ¶ 9; Comcast Exh. 77 at 33-34 ¶ 57 (Testimony of Michael Egan); Tennis Channel Exh. 16 at 15 ¶ 27 (Testimony of Hal Singer).

³⁵ *Initial Decision*, 26 FCC Red at 17164 ¶ 9; Comcast Exh. 77 at 34 ¶ 58 (Testimony of Michael Egan).

12. On January 5, 2010, Tennis Channel filed a complaint with the Commission asserting that Comcast used its market power as the nation's largest cable operator to disadvantage Tennis Channel and protect the competing networks with which it was affiliated.³⁶ Since Comcast began carrying Tennis Channel in 2005, the network has been placed on the premium Sports and Entertainment Package tier ("Sports Tier") on the vast majority of Comcast systems.³⁷ To access this tier, subscribers must pay an additional \$5 to \$8 per month above what they pay for basic digital cable service.³⁸ The carriage agreement between Tennis Channel and Comcast gives the latter discretion in determining the tiers on which it will carry Tennis Channel [REDACTED].³⁹ Golf Channel and Versus, Comcast-affiliated networks that Tennis Channel views as competitors, generally are offered on Comcast's Digital Starter Tier or Expanded Basic Tier,⁴⁰ which are available to all digital subscribers at no additional cost and reach [REDACTED] of Comcast's customers.⁴¹ By contrast, Comcast's Sports Tier reaches approximately [REDACTED] of Comcast's customers.⁴² In 2009, Tennis Channel, pointing to recent viewership growth and programming improvements, asked Comcast to increase its distribution as the carriage agreement between them allowed by repositioning it to a tier that had broader penetration than the Sports Tier.⁴³ Comcast rejected Tennis Channel's proposal.⁴⁴

13. In its complaint, Tennis Channel argues that it is similarly situated to Golf Channel and Versus,⁴⁵ that Comcast discriminated against Tennis Channel because the network is unaffiliated with Comcast,⁴⁶ and that Comcast's discrimination unreasonably restrains Tennis Channel's ability to compete fairly.⁴⁷ As relief, Tennis Channel requests that Comcast be required to carry Tennis Channel on non-discriminatory terms and conditions, specifically by carrying Tennis Channel on each of Comcast's systems on a programming tier that is as broadly distributed as the most highly-penetrated tier on which it

³⁶ The Tennis Channel, Inc., Program Carriage Complaint File No. CSR-8258-P, at 2 ¶ 3, filed by Tennis Channel (July 5, 2010) ("Complaint").

³⁷ *Initial Decision*, 26 FCC Rcd at 17167 ¶ 17; Tr. 1990 (Madison Bond).

³⁸ *Initial Decision*, 26 FCC Rcd at 17165-66 ¶ 14; Comcast Exh. 78 (Testimony of Jennifer Gaiski) at 2 ¶ 4).

³⁹ *Initial Decision*, 26 FCC Rcd at 17166-67 ¶ 16; Tennis Channel Exh. 144 at 9 ¶ 6.2.1; Tr. 2159 (Madison Bond).

⁴⁰ *Initial Decision*, 26 FCC Rcd at 17165 ¶ 12; Tennis Channel Exh. 16 at 7 ¶ 18 (Testimony of Hal Singer).

⁴¹ *Initial Decision*, 26 FCC Rcd at 17165 ¶ 12; see Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

⁴² *Initial Decision*, 26 FCC Rcd at 17166 ¶ 14; see Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer). Comcast has other tiers with different levels of penetration, including a Digital Preferred Tier. The Digital Preferred Tier is the second most highly penetrated tier for digital Comcast customers, reaching [REDACTED] of Comcast's customers. *Initial Decision*, 26 FCC Rcd at 17165 ¶ 13; see Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer); Tr. 2190-91 (Madison Bond). This tier carries the NHL Network, the MLB Network, and NBA TV. *Initial Decision*, 26 FCC Rcd at 17165 ¶ 13; Tennis Channel Exh. 16 at 9 ¶ 20 (Testimony of Hal Singer).

⁴³ *Initial Decision*, 26 FCC Rcd at 17168 ¶ 19; Tennis Channel Exh. 14 at 9 (¶¶ 18-19) (Testimony of Ken Solomon).

⁴⁴ *Initial Decision*, 26 FCC Rcd at 17170 ¶ 23; Tr. 352-53 (Ken Solomon); Comcast Exh. 78 at 7 ¶ 17 (Testimony of Jennifer Gaiski).

⁴⁵ *Complaint* at 23-26 ¶¶ 56-63.

⁴⁶ *Id.* at 27-32 ¶¶ 64-74.

⁴⁷ *Id.* at 32-45 ¶¶ 75-100.

carries one or more of its affiliated sports networks.⁴⁸ Tennis Channel also requests that Comcast be required to carry Tennis Channel on all systems in Standard Definition and, where feasible, High Definition, pay an appropriate licensing fee for the new required carriage, and negotiate in good faith a new agreement that governs carriage of Tennis Channel following the expiration of the current agreement between the parties.⁴⁹

14. On October 5, 2010, the Media Bureau released its Hearing Designation Order Notice of Opportunity for Hearing for Forfeiture.⁵⁰ As an initial matter, the Media Bureau rejected Comcast's arguments that Tennis Channel had filed its complaint after the one year statute of limitations had run, finding that the plain language of the statute of limitations provision allowed Tennis Channel to file within one year of notifying Comcast of its intent to file.⁵¹ The Media Bureau further concluded that Tennis Channel had established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Communications Act and Section 76.1301(c) of the Commission's rules.⁵² The Media Bureau also found that there were "significant and material questions of fact warranting resolution at hearing."⁵³ The Media Bureau designated the dispute to an ALJ to resolve the following issues:

(a) To determine whether Comcast has engaged in conduct the effect of which is to unreasonably restrain the ability of The Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by The Tennis Channel, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and

(b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof; and/or whether Comcast should be required to implement such other carriage-related remedial measures as are deemed appropriate; and

(c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether a forfeiture should be imposed on Comcast.⁵⁴

The ALJ was directed by the Media Bureau to "develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues" and to do so on an expedited basis.⁵⁵

⁴⁸ *Id.* at 45 ¶ 101.

⁴⁹ *Id.* at 45-46 ¶¶ 102, 104.

⁵⁰ *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket 10-204, 25 FCC Rcd 14149 (MB 2010) ("*Hearing Designation Order*").

⁵¹ *Id.* at 14154-14156 ¶ 11.

⁵² *Id.* at 14153 ¶ 9.

⁵³ *Id.* at 15154 ¶ 10.

⁵⁴ *Id.* at 14163 ¶ 24.

⁵⁵ *Id.* at 14162-63 ¶ 23.

15. Following the completion of discovery and the submission of direct testimony, proposed exhibits, and trial briefs, hearings before the ALJ were held at Commission headquarters from April 25, 2011 through May 2, 2011.⁵⁶ In these hearings, four witnesses appeared on behalf of Tennis Channel, seven witnesses appeared on behalf of Comcast, and thousands of documentary exhibits were received into evidence.⁵⁷ The ALJ issued his Initial Decision on December 16, 2011.

C. The Initial Decision

16. The ALJ concluded that Tennis Channel, Golf Channel, and Versus are similarly situated networks.⁵⁸ He found that the three networks provide year-round sports programming, attract similar types of viewers, “i.e., predominantly male, affluent adults within the same overlapping age ranges,” target the same advertisers, and have similar ratings.⁵⁹ Tennis Channel and Versus, he noted, have a history of sharing or seeking rights to the same sporting events.⁶⁰

17. The ALJ determined that Comcast’s evidence that the channels were not similarly situated was unpersuasive. He rejected the testimony of Michael Egan, Comcast’s programming expert, that the networks were not similarly situated, finding that the testimony lacked credibility because Egan’s methodology diverged from a methodology he had used in the past, and because the distinctions Egan drew between the networks were not significant or convincing.⁶¹ The ALJ also rejected other efforts by Comcast to distinguish the channels as being unsupported by the evidence or overwhelmed by other factors.⁶²

18. The ALJ found it undisputed that Comcast gave Golf Channel and Versus far more favorable channel placement and broader carriage than Tennis Channel.⁶³ The ALJ further found that these differences were based upon affiliation, citing the acknowledgment of Steven Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, that affiliated networks “get treated like siblings as opposed to like strangers” and receive a “different level of scrutiny” than unaffiliated providers.⁶⁴ The ALJ further noted that “[e]very one of [Comcast’s] affiliated networks is

⁵⁶ *Initial Decision*, 26 FCC Red at 17162 ¶ 3.

⁵⁷ *Id.*

⁵⁸ *Id.* at 17170 ¶ 24.

⁵⁹ *Id.* at 17170-71 ¶ 24.

⁶⁰ *Id.* at 17171 ¶ 26.

⁶¹ *Id.* at 17172-76 ¶¶ 28-36.

⁶² *Id.* at 17177, 17179, 17180, 17181-82, 17183-85 ¶¶ 38-39, 42, 44, 46-47, 49-52.

⁶³ *Id.* at 17185-86 ¶¶ 53-54. Comcast’s Washington D.C. system, for example, carries Versus on Channel 7 and Golf Channel on Channel 11, while carrying Tennis Channel on Channel 726. *Id.* at 17185 ¶ 53. Golf Channel and Versus are carried on the Expanded Basic or Digital Starter tiers that reach approximately [REDACTED] of Comcast subscribers while Tennis Channel is carried on the Sports Tier that reaches only about [REDACTED] of Comcast subscribers. *Id.* at 17185-86 ¶ 54.

⁶⁴ *Id.* at 17186 ¶ 55. The ALJ also notes that the Comcast executive responsible for distribution decisions, Madison Bond, testified that Comcast has a “sibling relationship” with its affiliated networks that “probably [affords those companies] greater access.” *Id.*

carried on more widely distributed tiers than the Sports tiers,” while it carries “only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier.”⁶⁵

19. The ALJ rejected Comcast’s attempt to demonstrate that its carriage and distribution decisions were not based on affiliation by pointing to the practices of other MVPDs with regard to the three networks at issue.⁶⁶ The distribution decisions of other MVPDs, the ALJ found, do not establish that Comcast’s carriage of Tennis Channel on the Sports Tier is “a result of a legitimate, non-discriminatory business decision because [Comcast’s] distribution of Tennis Channel has an influence on the distribution decisions of other MVPDs.”⁶⁷ The ALJ cited a “ripple effect” that increases the likelihood that other MVPDs will carry the network at the same level of distribution as Comcast, and noted that this “ripple effect” is enhanced by Comcast’s status as the largest MVPD in the United States.⁶⁸ The ALJ also rejected Comcast’s argument about the distribution decisions of other MVPDs on the grounds that Comcast’s distribution of Golf Channel, Versus, and Tennis Channel are “not in line with the distribution of those networks in the market generally,” with record evidence showing that Comcast carries Golf Channel and Versus at a higher penetration rate and carries Tennis Channel at a lower rate than those networks are carried by other MVPDs.⁶⁹

20. The ALJ also rejected Comcast’s arguments that its differential treatment of the three networks could be explained by factors other than discrimination. Comcast argued that Golf Channel and Versus achieved wide distribution at an earlier period in time and networks are rarely repositioned once they obtain broad penetration.⁷⁰ To the contrary, the ALJ noted evidence in the record that Comcast gave other, more recently positioned Comcast-affiliated sports networks much broader carriage than Tennis Channel.⁷¹ The ALJ also rejected Comcast’s argument that its carriage decision for Tennis Channel was based on a cost-benefit analysis.⁷² The “cost-benefit analysis,” the ALJ noted, examined only costs and made no attempt to quantify benefits that would arise from carrying Tennis Channel on more widely penetrated tiers.⁷³ In declining Tennis Channel’s proposed carriage agreement, the ALJ pointed out, Comcast did not make a written analysis of whether the acceptance of the offer would result in an increase in subscribers or additional upgrades and “never gave any consideration” to whether acceptance would result in additional revenues through the sale of advertising availabilities.⁷⁴ The ALJ found the record to show that Comcast “pays substantially more for carrying Golf Channel and Versus than it would if it were to carry Tennis Channel at the same level of distribution.”⁷⁵ While Comcast notes that it

⁶⁵ *Id.* at 17187 ¶ 57.

⁶⁶ *Id.* at 17189 ¶ 62.

⁶⁷ *Id.* at 17189 ¶ 63.

⁶⁸ *Id.*

⁶⁹ *Id.* at 17190-91 ¶¶ 66-67.

⁷⁰ *Id.* at 17193 ¶ 72.

⁷¹ *Id.* at 17193 ¶ 73.

⁷² *Id.* at 17195 ¶ 75.

⁷³ *Id.* at 17195 ¶ 76.

⁷⁴ *Id.* at 17195 ¶ 76 & n.252.

⁷⁵ *Id.* at 17196 ¶ 77.

convened a June 8 teleconference with the ostensible goal of seeking feedback from Comcast regional executives as to local system and customer interest in distributing Tennis Channel more broadly,⁷⁶ the ALJ found that the weight of record evidence led “to the inescapable conclusion” that the teleconference was merely “a ploy to shore up [Comcast’s] defense strategy having sensed imminent future litigation and not to gauge the interest of its local systems in repositioning Tennis Channel.”⁷⁷

21. The ALJ concluded that Comcast benefits economically by favoring affiliated networks over unaffiliated networks. “There is an economic benefit realized by Comcast in retaining a dual distribution system that involves carrying Tennis Channel (and other unaffiliated sports networks) exclusively on the Sports Tier, while carrying affiliated sports networks on widely penetrated tiers.”⁷⁸ He observed that networks on the Sports Tier receive less in license fees than those carried on broadly distributed tiers and face greater difficulty in attracting advertisers and competing for programming rights, creating an economic incentive for Comcast to “protect its affiliated sports networks from these disadvantages by carrying them on broadly penetrated tiers, while leaving only unaffiliated networks disadvantaged on the least penetrated Sport Tier.”⁷⁹

22. The ALJ concluded that Comcast’s unequal treatment of Tennis Channel adversely affected Tennis Channel’s ability to compete fairly in the video programming marketplace.⁸⁰ Relegating Tennis Channel to the Sports Tier “greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees,”⁸¹ “hinders the network’s ability to compete for valuable programming rights,”⁸² “makes it more difficult for the network to sell advertising,”⁸³ and causes a reduction in advertising revenues.⁸⁴

23. The ALJ rejected Comcast’s arguments that Tennis Channel was not unreasonably restrained from fairly competing. Comcast argued that all Comcast subscribers could access Tennis Channel by subscribing to the Sports Tier or switching to another MVPD that carries Tennis Channel more broadly.⁸⁵ The ALJ found this argument unpersuasive because Comcast subscribers must pay an additional fee for the Sports Tier, a practice in which only [REDACTED] of Comcast subscribers

⁷⁶ *Id.* at 17169 ¶ 21.

⁷⁷ *Id.* at 17170 ¶ 22.

⁷⁸ *Id.* at 17197 ¶ 79.

⁷⁹ *Id.* at 17197 ¶ 80.

⁸⁰ *Id.* at 17198 ¶ 81.

⁸¹ *Id.* at 17198 ¶ 82. The ALJ also cites unfavorable channel placement as a hindrance to Tennis Channel’s ability to attract viewers. *Id.* at 17199 ¶ 85.

⁸² *Id.* at 17199 ¶ 86. The ALJ concluded that Tennis Channel’s ability to compete for programming rights was hindered by both a reduction in the amount in licensing fees available to networks to spend on programming and the tendency of holders of broadcast rights in high-profile events to favor networks with broader distribution over those with narrower distribution. *Id.* at 17199-17200 ¶ 86.

⁸³ *Id.* at 17200 ¶ 89. “Tennis Channel’s Senior Vice President of Advertising Sales[] testified that the network’s limited distribution is ‘the single most prevalent reason’ given by advertisers for not placing advertisements on Tennis Channel.” *Id.* at 17201 ¶ 90.

⁸⁴ *Id.* at 17202 ¶ 91.

⁸⁵ *Id.* at 17199 ¶ 84.

engage, while Comcast subscribers do not have to pay a fee or switch MVPDs to view Golf Channel or Versus.⁸⁶ According to the ALJ, the added cost is “a significant impediment to Tennis Channel’s ability to attract the one in four viewers in the United States that subscribe to Comcast.”⁸⁷

24. The ALJ concluded that “[a] party seeking to establish a violation of sections 616 and 76.1301(c) must show (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly.”⁸⁸ He ruled that Tennis Channel must bear the burden of proof, but noted that the manner in which the burden of proof is allocated was immaterial to this case’s disposition because “under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that [Comcast] discriminated against Tennis Channel . . . and that this discrimination had the effect of restraining Tennis Channel’s ability to compete fairly in violation of section 616 of the Act and Section 76.1301(c) of the Commission’s rules.”⁸⁹

25. After taking into account the relevant statutory and regulatory factors, the ALJ ordered Comcast to pay a forfeiture of \$375,000.⁹⁰ He also ordered Comcast to afford Tennis Channel the same treatment in the terms and conditions of video program distribution that it provides to its similarly situated affiliates, Golf Channel and Versus.⁹¹ Subject to an exception regarding analog services,⁹² the ALJ required Comcast to carry Tennis Channel at the same level of distribution as Golf Channel and Versus, although it retained “full discretion in determining the level of penetration it chooses to carry the three channels.”⁹³ The ALJ also required Comcast to provide Tennis Channel with equitable treatment as to channel placement.⁹⁴ In coming to these conclusions, the ALJ rejected Comcast’s arguments that such a remedy would infringe upon its First Amendment right to exercise editorial discretion.⁹⁵

26. On January 19, 2012, Comcast filed Exceptions to the Initial Decision and appealed the Initial Decision to the Commission.⁹⁶ On the same day, Comcast filed an Application for Review of the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 17203 ¶ 97.

⁸⁹ *Id.* at 17204 ¶ 100-101.

⁹⁰ *Id.* at 17210 ¶ 118.

⁹¹ *Id.* at 17211 ¶ 119.

⁹² *Id.* at 17211 ¶ 119 & n.353. The ALJ accepted Comcast’s argument that analog tiers were subject to bandwidth limitations such that adding Tennis Channel to the analog expanded basic level of service would require deletion of an existing network from that tier. The ALJ therefore excluded “analog systems where the addition of Tennis Channel would require displacement of existing networks” from the ordered remedy. *Id.* at 17211 n.353.

⁹³ *Id.* at 17211 ¶ 119.

⁹⁴ *Id.* at 17211-12 ¶ 120.

⁹⁵ *Id.* at 17205-06 ¶¶ 102-04.

⁹⁶ Comcast Cable Communications, L.L.C. Exceptions to Initial Decision, MB Docket No. 10-204, File No. CSR 8258-P (filed Jan. 19, 2012) (“*Comcast Exceptions*”).

Media Bureau's finding that Tennis Channel's complaint was not barred by the statute of limitations.⁹⁷ On February 6, 2012, Tennis Channel filed a Reply to Comcast's Exceptions⁹⁸ and an opposition to Comcast's Application for Review.⁹⁹ On May 2, 2012, the Commission issued a stay of the Initial Decision pending the Commission's order in this case.¹⁰⁰

III. DISCUSSION

27. We find that the record evidence, viewed in its entirety, supports the ALJ's conclusion that Comcast discriminated with regard to carriage against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation in violation of Section 616 of the Act and Section 76.1301(c) of the Commission's rules. We also find that the ALJ's ordered remedy with regard to carriage was appropriate and consistent with Section 616, the Commission's rules, and the Media Bureau's Hearing Designation Order. We reject the ALJ's ordered channel placement remedy as unsupported by the record. In coming to these conclusions, we deny the exceptions presented by Comcast to the ALJ's Initial Decision, except Comcast's exception regarding the channel placement remedy. We also conclude that the "similarly situated" discrimination analysis and the ALJ's ordered equal carriage remedy are consistent with the First Amendment.

A. Statute of Limitations

28. Before we turn to Comcast's Exceptions to the Initial Decision, we must address Comcast's argument that Tennis Channel's complaint should have been dismissed by the Media Bureau as time-barred. Comcast argues that Tennis Channel exceeded the applicable statute of limitations period because it filed its complaint more than one year after entering into the March 2005 carriage agreement with Comcast.¹⁰¹ We reject Comcast's argument.

29. The allegedly discriminatory conduct at issue in Tennis Channel's complaint is Comcast's refusal in June 2009 to exercise its discretion under its existing contract with Tennis Channel to relocate Tennis Channel to a more widely distributed tier.¹⁰² Tennis Channel notified Comcast of its intent to file a complaint in December 2009 and filed its complaint in January 2010.¹⁰³ Both the notification of its intent to file a complaint and the actual filing occurred well within one year of the conduct that allegedly violated Section 616.

30. 47 C.F.R. § 76.1302(f) sets forth the events that trigger the statute of limitations for Section 616 complaints: a complaint must be filed within one year of (1) the MVPD entering into a contract with a video programming distributor that is alleged to violate the rules; or (2) the MVPD

⁹⁷ Comcast Cable Communications, LLC, Application for Review, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012) ("*Comcast App. for Rev.*").

⁹⁸ The Tennis Channel, Inc., Reply to Exceptions to Initial Decision, MB Docket No.10-204, File No. CSR 8258-P (filed Feb. 6, 2012) ("*Tennis Channel Reply*").

⁹⁹ The Tennis Channel, Inc., Opposition to Application for Review, MB Docket No.10-204, File No. CSR 8258-P (filed Feb. 6, 2012) ("*Tennis Channel Opp. to App. for Rev.*").

¹⁰⁰ *Tennis Channel, Inc. v. Comcast Cable Communications*, Order, MB Docket No. 10-204, File No. CSR-8258-P (rel. May 14, 2012).

¹⁰¹ *Comcast App. for Rev.* at 2.

¹⁰² *Complaint* at 21 ¶ 52.

¹⁰³ *Id.* at 3-4 ¶ 7.

offering to carry a video programming vendor's programming pursuant to impermissible terms that are unrelated to any existing contract between the MVPD and the complainant; or (3) a party notifying an MVPD that it intends to file a complaint with the Commission based on violations of the rules.¹⁰⁴ We find that the third trigger, Section 76.1302(f)(3), is the only one that applies to the circumstances here. The third trigger does not specify precisely what impermissible conduct starts the clock. Instead, it facially covers all allegedly impermissible conduct, and the one-year period starts to run when the complaining party (here Tennis Channel) notifies the MVPD (here Comcast) of an intent to file a complaint. There is no dispute that Tennis Channel filed its complaint within one year of notifying Comcast of its intent to do so.¹⁰⁵

31. Comcast argues that the first trigger applies to this dispute and that the one year period started to run when Tennis Channel entered into its contract with Comcast in 2005.¹⁰⁶ This argument is inconsistent with the plain language of Section 76.1302(f)(1). The first trigger starts the one-year clock when the parties enter into a contract that "a party alleges to violate one or more of the rules contained in this section."¹⁰⁷ In other words, the first trigger only applies when a contract is alleged to violate the rules. Tennis Channel makes no such allegation about the March 2005 contract.¹⁰⁸

32. The Media Bureau in its HDO similarly concluded that the third trigger, Section 76.1302(f)(3), applies.¹⁰⁹ Comcast raises three objections to this conclusion. First, Comcast argues that the statute of limitations rule "must be read to give each element meaning," and that properly read the third trigger "concerns a refusal to deal and other similar conduct that is not expressly covered by the first and second prongs."¹¹⁰ Even if we were to accept Comcast's argument that each trigger in Section 76.1302(f) must be exclusive, we disagree with Comcast's assertion that the conduct at issue here falls

¹⁰⁴ 47 C.F.R. § 76.1302(f)(2011).

¹⁰⁵ Comcast argues that reading the third trigger in this way results in an "oxymoronic, unlimited limitations period." *Comcast App. for Rev.* at 3. In the *Program Carriage Order and NPRM*, we acknowledged that the third trigger could be read to provide that a complaint is timely filed even if the allegedly discriminatory act occurred many years before the filing of the complaint and that, based on such a reading, the third trigger "undermines the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'" *Program Carriage Order and NPRM*, 26 FCC Red at 11522-23 ¶ 38 (quoting *Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, 453 ¶ 12 (Review Board 1971)). To address this concern, we "propose[d] to revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules." *Id.* at 11523 ¶ 39. Tennis Channel's complaint would be timely even under this proposed revision to the program carriage statute of limitations. Moreover, even without this proposed revision, we read subsection 76.1302(f)(3) consistent with the doctrine of laches to impliedly require notification of an intent to file a complaint within a reasonable time period of discovery of the allegedly unlawful conduct. Because the allegedly unlawful conduct at issue here occurred within one year of the filing of the complaint, we need not determine precisely what period of time would be "reasonable" here.

¹⁰⁶ *Comcast App. for Rev.* at 2.

¹⁰⁷ 47 C.F.R. § 76.1302(f)(1).

¹⁰⁸ As the Media Bureau noted, accepting Comcast's interpretation that the clock starts running when the contract is entered into, regardless of whether the allegations at issue concern the contract at the time of its formation, would "preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed." *Hearing Designation Order*, 25 FCC Red at 14158 n.82.

¹⁰⁹ *Id.* at 14154 ¶ 11.

¹¹⁰ *Comcast App. for Rev.* at 2-3.

under the first trigger. As noted above, Tennis Channel's complaint does not allege that the 2005 contract was improperly discriminatory, but instead focuses on Comcast's 2009 conduct. As for Comcast's assertion that the third trigger concerns refusals to deal or similar conduct, we find no support for that view in the text. Comcast relies upon the fact that the rule was originally promulgated with this limitation.¹¹¹ However, the Commission removed the limiting language in 1994, and there is no support for reading it back in notwithstanding its willful deletion.¹¹²

33. Second, Comcast argues that the Media Bureau's reading renders the first trigger "functionally meaningless by allowing [the] parties to 'reset' the limitations period at any time merely by unilaterally demanding a material change to the terms of an existing agreement and delivering a notice of its intent to file a complaint if its demand is not met."¹¹³ This argument fails to take into account the fact that under the March 2005 contract, Comcast had discretion as to Tennis Channel's carriage.¹¹⁴ Comcast had an obligation to exercise that discretion consistent with Section 616. As the Media Bureau explained, "The gravamen of The Tennis Channel's complaint is that Comcast has refused to exercise its discretion to [move Tennis Channel to a more widely distributed tier], and has thus failed to meet its obligation under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules to avoid discrimination on the basis of affiliation. It is this refusal, not the terms of the contract, which forms the basis for The Tennis Channel's complaint."¹¹⁵ In other words, Tennis Channel was not trying to demand a unilateral change in the existing terms of its contract with Comcast; it was asking that the existing contract be performed—that Comcast exercise its contractual discretion—consistent with its obligations under Section 616.¹¹⁶

34. Third, Comcast argues that Tennis Channel brought its complaint "as the culmination of a strategic effort, begun no later than January 2007, to undo the terms of its carriage agreement with Comcast."¹¹⁷ We do not think it is relevant whether Tennis Channel was dissatisfied with Comcast's carriage prior to 2009. The complaint is focused on Comcast's behavior within the statute of limitations period, specifically its refusal in June 2009 to relocate the network to a more widely distributed tier, and the question before us is whether that conduct constituted a violation of Section 616. Even if Tennis Channel could have requested broader carriage from Comcast earlier, that does not mean Tennis Channel was obligated to do so. Comcast seems to suggest that Tennis Channel had an obligation to request broader carriage under the terms of the existing contract at the precise moment when it thought it was entitled to broader carriage, and not a moment later. As Tennis Channel explains, it "was aware of the remedies under Section 616 but concluded that it should first build its service and approach Comcast for relief from inadequate carriage."¹¹⁸ Tennis Channel waited until it thought it had a sufficiently compelling case for broader carriage. It made that case to Comcast. Comcast, with discretion to provide broader carriage under its existing agreement with Tennis Channel, had an obligation to evaluate that case

¹¹¹ *Id.* at 3.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Initial Decision*, 26 FCC Red at 17166-67 ¶ 16; Tennis Channel Exh. 144 at 9 ¶ 6.2.1; Tr. 2159 (Madison Bond).

¹¹⁵ *Hearing Designation Order*, 25 FCC Red at 14155 ¶ 12.

¹¹⁶ The 2005 contract between Comcast and Tennis Channel does not [REDACTED], but rather [REDACTED]. Tennis Channel Exh. 144 at 9 ¶ 6.2.1.

¹¹⁷ *Comcast App. for Rev.* at 4.

¹¹⁸ *Tennis Channel Opp. to App. for Rev.* at 5.

in a nondiscriminatory manner. Comcast's alleged failure to do so, which occurred in June 2009, is the basis for Tennis Channel's Complaint.

B. Standard of Review

35. We review the ALJ's Initial Decision *de novo*.¹¹⁹ However, we accord deference to the ALJ's credibility determinations.¹²⁰

36. Comcast argues that where First Amendment rights are asserted, we must make an independent examination of the whole record and should not accord our usual deference to the ALJ's specific credibility findings.¹²¹ However, the cases to which Comcast cites reaffirm that, while in certain First Amendment cases reviewing courts have a special obligation to review the record in full, credibility determinations are still reviewed with deference.¹²² In any event, our independent review of the record, as set forth below, supports the ALJ's conclusions that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, and that Comcast's discrimination unreasonably restrained Tennis Channel's ability to compete in the marketplace. We need not rely on any credibility determinations to come to our conclusions here.

C. Burden of Proof

37. The Commission's orders have left open the question whether the burden of proof remains with the complainant in a Section 616 case even after successfully establishing a *prima facie* case of discrimination.¹²³ The ALJ, in his Initial Decision, determined that Tennis Channel retained the burden of proof notwithstanding the Media Bureau's finding that Tennis Channel had established a *prima facie* case.¹²⁴ Tennis Channel does not dispute this determination in its filings before the Commission.

38. We assume, *arguendo*, that Tennis Channel retains the burden of proof, but continue to leave this question open until the completion of the Commission's related rulemaking process.¹²⁵ We conclude, for the reasons set forth below, that the record evidence is sufficient to satisfy a burden of proof by Tennis Channel.

¹¹⁹ See, e.g., *Imposition of Forfeiture Against Capitol Radiotelephone Inc. d/b/a Capitol Paging*, 11 FCC Red 2335, 2342 (1996).

¹²⁰ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 26 FCC Red 8971, 8983 ¶ 39 (2011) ("*WealthTV*"), appeal docketed sub. nom. *Herring Broad., Inc. d/b/a WealthTV v. FCC*, No. 11-73134 (9th Cir. Oct. 18, 2011).

¹²¹ *Comcast Exceptions* at 4-5.

¹²² See *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989) (noting that "credibility determinations are reviewed under the clearly-erroneous standard"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-500 (1984) (same).

¹²³ *Wealth TV*, 26 FCC Red at 8977-78 ¶ 18; *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Red 18099, 18105 ¶ 11 (2010), *aff'd*, No. 11-1151, 2012 WL 1672264 (4th Cir. May 14, 2012) ("*MASN*").

¹²⁴ *Initial Decision*, 26 FCC Red at 17204 ¶ 100.

¹²⁵ *Program Carriage Order and NPRM*, 26 FCC Red at 11544-46 ¶¶ 79-81.

D. The Initial Decision's Conclusion that Comcast Violated Section 616 is Consistent with Section 616 and is Supported by the Record

39. For reasons set forth below, we find that the Initial Decision's conclusion that Comcast violated Section 616 and Section 76.1301(c) is consistent with the Act and Commission rules and is supported by the record. In making these determinations, we reject Comcast's constrained reading of Section 616 and its efforts to characterize Section 616 as tracking antitrust law, particularly the "essential facilities" doctrine.¹²⁶

I. Section 616 was Enacted to Address Concerns about Vertical Integration

40. Insisting that Section 616 incorporates the antitrust "essential facilities" doctrine, Comcast urges us to read Section 616's "unreasonably restrain" language to mean "that the programmer [must] suffer[] a severe competitive handicap by dint of its inability to access a necessary service."¹²⁷ We find no support for this standard or for the notion that Congress's concern in passing Section 616 was, as Comcast argues, cable operators' "then-bottleneck power."¹²⁸ Congress applied Section 616 to all MVPDs, not just cable operators.¹²⁹ Furthermore, Congress provided only that, in order to be prohibited, discrimination must unreasonably restrain the ability of an unaffiliated programming vendor to fairly compete; Congress did not incorporate standards borrowed from the distinct antitrust doctrine of essential facilities, or speak in terms of "access to a necessary service."

41. Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the "essential facilities" doctrine. The legislative history, moreover, expressly repudiates such a design. The House Report explains, "This legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section."¹³⁰ In short, Section 616 was intended to operate alongside existing antitrust law, and to read Section 616 to simply echo antitrust law would frustrate Congress's clear purpose to grant the Commission new authority to address concerns specific to MVPDs and affiliated programming.¹³¹

42. Contrary to Comcast's arguments, our reading of the history of Section 616 reveals that it

¹²⁶ *Comcast Exceptions* at 5-7.

¹²⁷ *Id.* at 6.

¹²⁸ *Id.*

¹²⁹ 47 U.S.C. § 536(a)(3) (applying the antidiscrimination requirement to "a multichannel video programming distributor").

¹³⁰ CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, H.R. REP. NO. 102-628, at 111 (1992) ("House Report").

¹³¹ See, e.g., *Satellite Bus. Sys. Apps. for Auth. Pursuant to Sections 308, 309 & 319 of the Commc'ns Act of 1934 to Construct Three Domestic Commc'ns Satellites: Apps. for Auth. Pursuant to Sections 308, 309 & 319 of the Commc'ns Act of 1934 to Construct Four Fixed Domestic Satellite Earth Stations at Poughkeepsie, N.Y.; Los Gatos, Cal.; Franklin Lakes, N.J.; & Agoura, Cal.*, 62 F.C.C.2d 997, 1067 ¶ 196 (1977) ("Under the regulatory scheme of the Communications Act, we consider antitrust issues as but one part of our larger public interest determination."). See also *United States v. FCC*, 652 F.2d 72, 87 (D.C. Cir. 1980) (*en banc*) ("[T]he agency is required to consider anticompetitive consequences as one part of its public interest calculus. [No] authority we have found makes the antitrust component of that calculus conclusive.").

was designed to address specific concerns about vertical integration in the video distribution market.¹³² Congress was concerned that “vertical integration gives cable operators the incentive and ability to favor their affiliated programming services,” thereby leading to reduced competition and diversity of programming.¹³³ Congress considered prohibiting vertical integration altogether, noting that such an approach “has appeal,” but ultimately decided that “[t]o ensure that cable operators do not favor their affiliated programmers over others,” it was appropriate to “bar[] cable operators from discriminating against unaffiliated programmers.”¹³⁴ With this goal of protecting competition at its core, Section 616 is structured to prohibit discrimination on the basis of affiliation when such discrimination has the effect of “unreasonably restrain[ing] the ability of an unaffiliated . . . programming vendor to compete fairly.”¹³⁵

43. Our reading of the “unreasonably restrain” language of Section 616 follows from the text of that provision: the discrimination must be unreasonable and have a restraining effect on the programmer’s ability to compete fairly in the MVPD distribution marketplace. As we explained recently, “[b]y favoring its affiliated programming vendor on the basis of affiliation, an MVPD can hinder the ability of an unaffiliated programming vendor to compete in the video programming market, thereby allowing the affiliated programming vendor to charge higher license fees and reducing competition in the markets for the acquisition of advertising and programming rights.”¹³⁶

2. The ALJ Correctly Concluded that Comcast Deliberately Discriminated Against Tennis Channel and in Favor of Golf Channel and Versus on the Basis of Affiliation

44. We find that the ALJ correctly concluded that Comcast both discriminated against Tennis Channel on the basis of nonaffiliation and discriminated in favor of Golf Channel and Versus on the basis of affiliation. We note that either of these forms of discrimination would be sufficient to entail a violation of Section 616 so long as the effect of the discrimination was to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly. Both Section 616 of the Act and Section 76.1301(c) of our Rules bar discrimination “on the basis of affiliation or nonaffiliation” when that discrimination unreasonably restrains the ability to compete fairly.¹³⁷

a. The Record Contains Circumstantial Evidence Indicating a General Practice by Comcast of Favoring Affiliates over Non-affiliates

45. The record contains significant circumstantial evidence that Comcast engaged in a general practice of favoring affiliates over nonaffiliates. This circumstantial evidence, standing alone, might not be sufficient to support a finding that Comcast discriminated against a nonaffiliate in a particular instance. However, this circumstantial evidence, when read in conjunction with the determination that Tennis Channel, Golf Channel, and Versus were similarly situated but treated differently without a nondiscriminatory reason, supports our finding that the record, when taken as a

¹³² See *Program Carriage Order and NPRM*, 26 FCC Red at 11497-98 ¶ 4 (citing *House Report*, CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, S. REP. NO. 102-92 (1991) (“*Senate Report*”).

¹³³ *Senate Report* at 25.

¹³⁴ *Id.* at 27.

¹³⁵ 47 U.S.C. § 536(a)(3). See also 47 C.F.R. § 76.1301(c).

¹³⁶ *Program Carriage Order and NPRM*, 26 FCC Red at 11517 ¶ 31.

¹³⁷ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

whole, establishes that Comcast discriminated on the basis of affiliation.¹³⁸

46. Two top Comcast executives, Stephen Burke and Madison Bond, likened Comcast's relationship with its affiliate networks to a "sibling" relationship.¹³⁹ Mr. Bond, the Executive Vice President of Content Acquisition, further testified in this proceeding that affiliates obtain "greater access to some degree" to Comcast decision-makers than non-affiliates.¹⁴⁰ Mr. Burke, Comcast Corporation's former Chief Operating Officer, indicated in a statement in another proceeding that affiliated networks are "treated like siblings as opposed to like strangers," and that affiliates "get a different level of scrutiny" than unaffiliated networks.¹⁴¹ Though Mr. Burke argued in a declaration in this case that his previous statement did not pertain to carriage decisions and "was simply an observation that individuals from Comcast Cable and Comcast's affiliated network group ('Programming Group') are known to each other by virtue of physical proximity,"¹⁴² this explanation is not consistent with his acknowledgment in his previous statement that affiliates "get a different level of scrutiny."¹⁴³

47. Comcast's carriage of sports networks tracks the significance of its equity stake, providing further circumstantial evidence that it generally favors affiliated networks over nonaffiliated networks. As the ALJ pointed out, Comcast Cable's two majority-owned sports networks, Golf Channel and Versus, are carried broadly on the highly penetrated Expanded Basic or Digital Starter tiers.¹⁴⁴ Comcast carries sports networks in which it has a minority or indirect ownership—NHL Network, MLB Network, and NBA TV—on its Digital Preferred Tier,¹⁴⁵ which reaches [REDACTED] of its subscribers

¹³⁸ Comcast argues that Section 616 requires a showing that an MVPD deliberately discriminated against a programmer based on affiliation. *Comcast Exceptions* at 12. Section 616 does require a showing of intentional or deliberate discrimination. We note, however, that this showing can be made via the use of either direct or circumstantial evidence of discrimination. *Initial Decision*, 26 FCC Rcd at 17206 ¶ 105; *Program Carriage Order and NPRM*, 26 FCC Rcd at 11503-05 ¶ 13-14; *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd 12967, 12998 ¶ 63 (ALJ 2009) ("*WealthTV Recommended Decision*"). *adopted by the Commission in WealthTV*.

¹³⁹ *Initial Decision*, 26 FCC Rcd at 17186 ¶ 55; Tennis Channel Ex. 7; Tr. 2249 (Madison Bond).

¹⁴⁰ Tr. 2249 (Madison Bond).

¹⁴¹ *Initial Decision*, 26 FCC Rcd at 17186 ¶ 55; Tennis Channel Ex. 7.

¹⁴² Tennis Channel Ex. 19-2.

¹⁴³ Comcast also argues that Mr. Burke's previous testimony is not significant by pointing to our Order in *WealthTV*. *Comcast Exceptions* at 20. In *WealthTV*, the ALJ refused to admit the same testimony by Mr. Burke into evidence because WealthTV attempted to introduce it through an improper procedure. *WealthTV*, 26 FCC Rcd at 8982 ¶ 34. We rejected WealthTV's exception to the ALJ's evidentiary ruling. *Id.* at 8982. Comcast does not argue in its *Exceptions* here that the procedure by which Mr. Burke's previous testimony was introduced was improper. In our *WealthTV* Order, we further stated that there was "no evidence that [Mr. Burke's] testimony in a separate proceeding had any bearing on WealthTV's specific complaint against Comcast or the other defendants." *Id.* WealthTV failed to lay a proper foundation for inclusion of the testimony and failed to show how Mr. Burke's testimony fit into a pattern of circumstantial evidence supporting the proposition of discrimination against it. *See id.* at 8982 ¶¶ 34-35. The circumstances are different here. Mr. Burke restated his previous testimony for this proceeding through his declaration. Tennis Channel 19-2. That testimony provides important context to the circumstantial evidence of Comcast's favorable treatment of Golf Channel and Versus that appears in the record, as described below.

¹⁴⁴ *Initial Decision*, 26 FCC Rcd at 17187 ¶ 57; Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

¹⁴⁵ *Initial Decision*, 26 FCC Rcd at 17187 ¶ 57; Tennis Channel Exh. 16 at 9 ¶ 20 (Testimony of Hal Singer).

and is more broadly distributed than the Sports Tier to which Tennis Channel is relegated.¹⁴⁶ Every single nationally distributed network carried exclusively on the Sports Tier is unaffiliated with Comcast.¹⁴⁷

48. This pattern holds even as Comcast launches new affiliated networks or changes its equity stake in existing networks. As the ALJ noted, in 2010, Comcast planned to launch the U.S. Olympic Network and include it as part of its digital basic offerings, which would “giv[e] it more exposure than competing premium sports cable channels.”¹⁴⁸ This was notwithstanding the fact that the new network would have no rights to air any Olympic games.¹⁴⁹ Comcast gave Outdoor Life Network, the Comcast-affiliated predecessor to Versus,¹⁵⁰ broad distribution notwithstanding the fact that the head of Comcast’s programming division referred to it at the time as “a crappy channel [that was] dead in the water.”¹⁵¹ When Comcast acquired an equity stake in the NHL Network, it moved it from the Sports Tier to the more highly penetrated Digital Preferred Tier.¹⁵² Similarly, Comcast changed its plans to place the MLB network on the Sports Tier after obtaining an equity stake, and placed it instead on the much more widely distributed Digital Preferred Tier.¹⁵³

49. In its exceptions, Comcast argues that this circumstantial evidence is irrelevant and not probative.¹⁵⁴ Comcast argues that there was no evidence in the record comparing Golf Channel, Versus, and Tennis Channel to the other sports channels carried on any Comcast tier, that there were specific nondiscriminatory reasons for the broader distribution of MLB Network and NHL Network, and that Comcast carries many unaffiliated networks broadly.¹⁵⁵ We agree that Comcast’s general pattern of carrying sports networks is not necessarily conclusive in establishing actual discrimination in a given instance. However, we find the pattern significant and consistent with the notion that Comcast treats affiliates like “siblings” with respect to carriage decisions. Furthermore, this circumstantial evidence diminishes the credibility of Comcast’s claims that it had legitimate nondiscriminatory reasons for carrying Tennis Channel less broadly than Golf Channel and Versus.

50. In order to conclusively establish discrimination by circumstantial evidence, the evidence must support the conclusion that, all else being equal, Comcast favors an affiliate or disfavors a non-

¹⁴⁶ *Initial Decision*, 26 FCC Red at 17187 ¶ 57; see Tr. 2190-91 (Madison Bond); Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

¹⁴⁷ Tr. at 2198 (Madison Bond).

¹⁴⁸ *Initial Decision*, 26 FCC Red at 17187-88 ¶ 58; Tennis Channel Exh. 77; Tr. 2188-89 (Madison Bond).

¹⁴⁹ *Initial Decision*, 26 FCC Red at 17187-88 ¶ 58; Tennis Channel Exh. 76-77; Tr. At 2184, 2186-87 (Madison Bond).

¹⁵⁰ Outdoor Life Network was renamed Versus in the mid-2000s, following a decision to shift its programming to include more traditional competitive sports. Tennis Channel Exh. 17 at 19 ¶ 35 (Testimony of Timothy Brooks).

¹⁵¹ *Initial Decision*, 26 FCC Red at 17188 ¶ 58; Tennis Channel Exh. 26; Tennis Channel Exh. 143 at 39 (Jeffrey Shell Deposition).

¹⁵² *Initial Decision*, 26 FCC Red at 17188 ¶ 59; Comcast Exh. 75 at 9 ¶ 24 (Testimony of Madison Bond); Tr. 2179 (Madison Bond); see Tr. 853 (Hal Singer).

¹⁵³ *Initial Decision*, 26 FCC Red at 17188 ¶ 59; Tennis Channel Exh. 16 at 10 ¶ 20 & n.18 (Testimony of Hal Singer); Tr. 855 (Hal Singer).

¹⁵⁴ *Comcast Exceptions* at 28-29.

¹⁵⁵ *Id.*

affiliate without a valid nondiscriminatory reason. We now weigh that kind of evidence with specific regard to Golf Channel, Versus, and Tennis Channel.

b. The Record Establishes that Golf Channel, Versus, and Tennis Channel are Similarly Situated

51. The record evidence establishes that Golf Channel, Versus, and Tennis Channel are similarly situated for purposes of determining whether discrimination on the basis of affiliation occurred. This is clear when the networks are compared along a series of important axes.

52. **Similar Sports Programming.** All three networks provide sports programming. As the ALJ noted, all three networks broadcast sporting events and other types of similar non-event sports-related content, such as lifestyle and instructional sports programming. Tennis Channel and Golf Channel are each devoted to a single sport with high levels of audience participation.¹⁵⁶ Furthermore, Tennis Channel and Versus have a history of repeatedly sharing or seeking rights to the same sporting events.¹⁵⁷

53. **Demographics.** Because the three networks carry similar programming, it is not surprising that the demographic evidence introduced before the ALJ indicates that the three networks target and reach similar audiences. All three channels target affluent viewers with very similar median household incomes.¹⁵⁸ All three channels skew male in their viewership.¹⁵⁹ And all three channels target adults in the overlapping 25-to-54 or 35-to-64 age brackets.¹⁶⁰

54. **Advertisers.** The record further established remarkable overlap in advertisers. As the ALJ noted, in 2010 [REDACTED] of Golf Channel's revenue and [REDACTED] of Versus's revenue from each of their 30 largest non-endemic advertisers came from either recent advertisers on Tennis Channel or from companies that Tennis Channel was soliciting to advertise.¹⁶¹ Of Tennis Channel's 30 largest non-endemic advertisers in 2010, [REDACTED] advertised on Golf Channel and [REDACTED] advertised on Versus.¹⁶²

55. **Ratings.** The ratings for the three channels—Golf Channel, Versus, and Tennis Channel—are almost identical. Measuring markets in the first nine months in 2010 where the channels

¹⁵⁶ *Initial Decision*, 26 FCC Red at 17171 ¶ 25; Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer). [REDACTED] of Tennis Channel viewers participate in tennis and [REDACTED] of Golf Channel viewers participate in golf. *Id.*

¹⁵⁷ *Initial Decision*, 26 FCC Red at 17171 ¶ 26; *see, e.g.*, Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 19 ¶ 42 (Testimony of Ken Solomon).

¹⁵⁸ *Initial Decision*, 26 FCC Red at 17176-77 ¶ 37; Tennis Channel Exh. 17 at 16-18, 23-25 ¶¶ 31-33, 42-45 (Testimony of Timothy Brooks); Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer).

¹⁵⁹ *Initial Decision*, 26 FCC Red at 17178 ¶ 41; Tennis Channel Exh. 17 at 16-18, 23-25 ¶¶ 31-33, 42-45 (Testimony of Timothy Brooks); Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer).

¹⁶⁰ *Initial Decision*, 26 FCC Red at 17179-80 ¶ 43; Tr. 713-14 (Timothy Brooks). *See also* Tr. 626 (Gary Herman).

¹⁶¹ *Initial Decision*, 26 FCC Red at 17180-81 ¶ 45; Tennis Channel Exh. 15 at 3-4 ¶¶ 8, 10, Exhibit B (Testimony of Gary Herman). Endemic advertisers are advertisers that exclusively promote products or services specific to a particular sport. Tennis Channel Exh. 15 at 3, 4 ¶¶ 7, 10 (Testimony of Gary Herman).

¹⁶² *Initial Decision*, 26 FCC Red at 17181 ¶ 46; Tennis Channel Exh. 15 at 4 ¶ 10 (Testimony of Gary Herman).

are available, both Tennis Channel and Golf Channel averaged total-day household ratings of [REDACTED],¹⁶¹ while Versus was within hundredths of a rating point at [REDACTED].¹⁶⁴

56. Comcast asserts that the ALJ made “six serious errors” in its similarly situated analysis.¹⁶⁵ These purported “errors,” taken together, are not sufficient to counterbalance the tremendous similarities between the networks established by the record.

57. First, Comcast argues that its broader carriage of Golf Channel and Versus is explained by the fact that when those channels were originally launched, MVPDs had spare capacity and were seeking new programming.¹⁶⁶ However, Comcast’s carriage decisions regarding other networks around the time of its alleged discrimination against Tennis Channel make clear that time-to-market distinctions cannot explain Comcast’s relegation of Tennis Channel to the Sports Tier. In 2009, Comcast granted carriage to two recently-affiliated sports networks—MLB Network and NHL Network—on the Digital Preferred Tier, which is much more broadly distributed than the Sports Tier.¹⁶⁷ Also in 2009, Comcast moved NBA TV, in which Comcast has an indirect ownership interest, from the Sports Tier to the Digital Preferred Tier.¹⁶⁸ Furthermore, the record evidence demonstrates that at the time of renewal, MVPDs generally consider whether to reposition networks they carry.¹⁶⁹ Comcast has moved unaffiliated networks to more narrowly penetrated tiers at these times.¹⁷⁰ Significantly, however, Comcast renewed agreements with Versus and Golf Channel in 2009 and 2010 without even considering such repositioning.¹⁷¹

58. Second, Comcast points to differences in programming between the networks, for example the fact that Tennis Channel shows some nonexclusive content and repeats of earlier matches while Golf Channel and Versus programs are exclusive and mostly current.¹⁷² Comcast also points out that Tennis Channel pays significantly less for its programming and argues that Tennis Channel has less of an ability to attract subscribers than Golf Channel and Versus.¹⁷³ As discussed below, we do not find these purported distinctions to be as significant as Comcast presents them to be, nor do we find them to overcome the significant evidence of similarity.

¹⁶³ *Initial Decision*, 26 FCC Red at 17183 ¶ 48; Tennis Channel Exh. 17 at 14-15 ¶ 28 (Testimony of Timothy Brooks).

¹⁶⁴ *Initial Decision*, 26 FCC Red at 17183 ¶ 48; Tennis Channel Exh. 17 at 20 ¶ 36 (Testimony of Timothy Brooks).

¹⁶⁵ *Comcast Exceptions* at 22-28.

¹⁶⁶ *Id.* at 22-23.

¹⁶⁷ *Initial Decision*, 26 FCC Red at 17193 ¶ 73; Tennis Channel Exh. 16 at 10 ¶ 20 & n.18 (Testimony of Hal Singer); Tr. 853, 855 (Hal Singer), Tr. 2179 (Madison Bond).

¹⁶⁸ *Initial Decision*, 26 FCC Red at 17193 ¶ 73; Tr. 2179-80, 2295 (Madison Bond).

¹⁶⁹ *Initial Decision*, 26 FCC Red at 17194 ¶ 74; Tr. 2240-41 (Madison Bond).

¹⁷⁰ *Initial Decision*, 26 FCC Red at 17194 ¶ 74; Tr. 2240-41, 2243 (Madison Bond).

¹⁷¹ *Initial Decision*, 26 FCC Red at 17194 ¶ 74; *see* Tr. 2226-28, 2297 (Madison Bond); Tr. 2409-10 (Jennifer Gaiski).

¹⁷² *Comcast Exceptions* at 23.

¹⁷³ *Id.* at 23-24.

59. With a careful examination of the three channels, Comcast's efforts to depict Tennis Channel's content as less attractive to subscribers rings hollow. For example, Comcast's point regarding Tennis Channel's non-exclusive tournament coverage is undermined by the fact that Tennis Channel covers all four Tennis Grand Slams,¹⁷⁴ while Golf Channel does not have the rights to air any of the four Golf Majors.¹⁷⁵ The relevance of Comcast's argument that Tennis Channel relies more on repeats is undermined by a comparison of the total number of hours of live event programming, a much more important metric for determining the freshness of sports programming. Tennis Channel airs almost exactly the same number of hours of live event programming as Golf Channel,¹⁷⁶ and airs more live event programming than Versus.¹⁷⁷ Furthermore, though Versus does not program non-live sporting events as often as Tennis Channel does, that does not mean that Versus is filling the balance of its schedule with fresh and appealing content; the second biggest category of programming on Versus is infomercials.¹⁷⁸

60. Comcast's argument regarding the amount that Tennis Channel pays for its programming as compared to Versus and Golf Channel may be of some significance as an indicator of the value of the programming to networks and subscribers, but its persuasive force is overwhelmed by the much more powerful evidence in the record regarding the very similar ratings among the channels. Furthermore, it is not clear from the record how well the cost of programming serves as a proxy for appeal. As noted in the record, some of the highest rated and valuable content on television consists of reality programming that is inexpensive to produce.¹⁷⁹

61. Also of some significance is evidence invoked by Comcast that supports the notion that subscribers value Golf Channel and Versus more than Tennis Channel. This evidence includes assertions by Comcast field representatives of a lack of consumer demand for Tennis Channel and testimony by an executive at Charter Communications to the same effect.¹⁸⁰ Comcast also argues that Golf Channel and Versus "have demonstrated a proven ability to attract and retain subscribers," by pointing to testimony that recounts how Charter Communications considered moving Golf Channel and Versus to a less penetrating tier but received a large number of Charter subscriber complaints after they viewed a crawl on the bottom of the screen on those networks that urged them to contact Charter.¹⁸¹ The fact that Charter subscribers responded to a crawl in support of Golf Channel and Versus tells us nothing about how subscribers would have responded to a similar crawl in similar circumstances in support of Tennis Channel. As with the evidence that Tennis Channel pays less for its programming, we ultimately do not think this evidence overcomes the forceful evidence in the record that demonstrates Tennis Channel's similarity to Golf Channel and Versus.

¹⁷⁴ *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at 7 ¶ 13 (Testimony of Ken Solomon).

¹⁷⁵ *Initial Decision*, 26 FCC Rcd at 17164 n.25; Tr. 1513 (Michael Egan).

¹⁷⁶ Tennis Channel aired [REDACTED] of live event programming, while Golf Channel aired [REDACTED] of such programming in the same period. *Initial Decision*, 26 FCC Rcd at 17173 n.106; Comcast Exh. 77 at 31 ¶ 51 (Testimony of Michael Egan).

¹⁷⁷ Versus aired "somewhere in the neighborhood" of [REDACTED] of live event programming a year. Tr. 1651 (Michael Egan).

¹⁷⁸ Tr. 2634 (Joseph Donnelly).

¹⁷⁹ *Initial Decision*, 26 FCC Rcd at 17185 ¶ 51; Tennis Channel Exh. 16 at 55 ¶ 79 (Testimony of Hal Singer).

¹⁸⁰ *Comcast Exceptions* at 24.

¹⁸¹ *Id.* at 24 n.105.

62. Third, Comcast attempts to undercut the importance of the similar ratings for the three networks by arguing that ratings “are of minimal importance to MVPDs, whose principal business is selling *subscriptions*, not *advertising*, for which ratings matter more.”¹⁸² As noted above, the evidence put forward by Comcast to suggest that Golf Channel and Versus drive more subscriptions than Tennis Channel is weak. Furthermore, the record indicates that Comcast itself relied upon ratings [REDACTED].¹⁸³

63. Fourth, Comcast argues that Golf Channel targets viewers older than those that Tennis Channel targets.¹⁸⁴ As the ALJ found, Golf Channel, Versus, and Tennis Channel all target adults in the overlapping 25-to-54 or 35-to-64 age brackets defined by Nielsen.¹⁸⁵ The record also demonstrates that the median age of Tennis Channel’s viewers is not drastically different from that of Golf Channel and Versus—within [REDACTED] years of that of Golf Channel and within [REDACTED] years of that of Versus.¹⁸⁶ While one could argue that the [REDACTED] year spread in median age between Tennis Channel and Golf Channel is not small enough to provide strong independent evidence that the networks are similarly situated, we do not believe it is large enough to constitute evidence against such a determination. This evidence, introduced by Comcast, is consistent with and reinforces the conclusion that the three networks targeted adults in overlapping age brackets. Comcast argues [REDACTED] that half of Golf Channel viewers are older than 54 and therefore cannot be reconciled with the finding that Golf Channel and Tennis Channel target viewers in the 25-to-54 age bracket.¹⁸⁷ This argument is unpersuasive as it is little more than an attempt at statistical gaming.¹⁸⁸ Using Comcast’s reasoning, half of Golf Channel viewers are younger than 54, which surely places a significant number of its viewers within that same 25-to-54 age bracket. This approach also ignores the 35-to-64 age bracket, which the record suggests is targeted by the three networks and into which a significant number of those Golf Channel viewers older than 54 certainly would fall.

64. Comcast also argues that the conclusion that Tennis Channel, like Golf Channel and Versus, targets male audiences is erroneous on the grounds that the record suggests that Tennis Channel appeals to both men and women.¹⁸⁹ In particular, Comcast cites the Recommended Decision in *WealthTV*, in which the ALJ rejected WealthTV’s argument that its network’s appeal skewed toward men by looking to marketing materials that demonstrated a broad appeal to both men and women.¹⁹⁰ Here, we find the most compelling evidence in the record of the networks’ appeal to be the 2010 MRI data on actual audience demographics, which shows that [REDACTED],¹⁹¹ a ratio close to that which Comcast’s

¹⁸² *Comcast Exceptions* at 25.

¹⁸³ *See, e.g.*, Tennis Channel Ex. 82 ([REDACTED]).

¹⁸⁴ *Comcast Exceptions* at 25-26.

¹⁸⁵ *Initial Decision*, 26 FCC Red at 17179-80 ¶ 43; Tr. 713-14 (Timothy Brooks). *See also* Tr. 626 (Gary Herman).

¹⁸⁶ *See Initial Decision*, 26 FCC Red at 17180 ¶ 44 & n.150; *see* Comcast Exh. 77 at 50 ¶ 87 (Testimony of Michael Egan). The median ages of Versus, Tennis Channel, and Golf Channel [REDACTED] respectively. *Id.*

¹⁸⁷ *Comcast Exceptions* at 25-26.

¹⁸⁸ This argument is inapplicable to Versus as its median age falls [REDACTED]. *See supra* note 184.

¹⁸⁹ *Comcast Exceptions* at 26.

¹⁹⁰ *Id.* (citing *WealthTV Recommended Decision*, 24 FCC Red at 12979-83 ¶¶ 27-34).

¹⁹¹ *Initial Decision*, 26 FCC Red at 17178 at ¶ 41; Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 18 (¶ 33); *see* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

own expert conceded to be male-skewed.¹⁹²

65. Fifth, Comcast attempts to rehabilitate the testimony of Comcast's programming expert, Michael Egan, which the ALJ determined was "not credible."¹⁹³ Though Mr. Egan had testified in *WealthTV* that a "genre" analysis was appropriate in evaluating similarity between networks,¹⁹⁴ in this case Egan testified about "sub-genres" within the sports genre and pointed to differences in the mix of sports programming on each channel—the amount of event vs. non-event programming; the popularity of each sport; the exclusive vs. nonexclusive programming; the amount of live vs. non-live programming; the amount of first run vs. repeat programming; and the amount spent on programming.¹⁹⁵ We do not find Mr. Egan's efforts to distinguish the networks by sub-genre persuasive. As the programming between any two networks could be distinguished if categorized finely enough, it was essential that Mr. Egan explain in his testimony why this particular "sub-genre" analysis was appropriate, especially when, by his admission, he was unaware of any prior use of this methodology in the cable industry.¹⁹⁶ Mr. Egan failed to provide such an explanation, leading us to agree with the ALJ's credibility determination. Even assuming Mr. Egan's analysis to be meaningful, we find that the similarities in programming among the three networks vastly outweigh the differences. The three networks carry similar amounts of live event programming.¹⁹⁷ Tennis Channel and Golf Channel are both single sports networks that, as noted above, reach audiences with similar demographics by income, age, and gender. And Tennis Channel and Versus competed directly against each other on numerous occasions to carry the same events.¹⁹⁸

66. We also do not find convincing Mr. Egan's efforts to characterize the three networks as having very different "images." Comcast complains that the ALJ improperly faulted Mr. Egan for offering observations on direct examination that were not part of his written testimony when those observations were made in response to questions by the ALJ.¹⁹⁹ We find Mr. Egan's testimony about the different images of the three networks unconvincing on its own terms. Mr. Egan asserts that Tennis Channel projects a "very international" image that differs from Golf Channel's "country club" image and

¹⁹² *Initial Decision*, 26 FCC Red at 17179 ¶ 42; Tr. 2714 (Marc Goldstein). Comcast cites [REDACTED] in which Tennis Channel held itself out [REDACTED] between male and female viewers. Comcast Exh. 127 at TTCCOM_00019131; Comcast Exh. 181 at TTCCOM_00022484; Comcast Exh. 268; Comcast Exh. 589 at TTCCOM_00086182. We find data demonstrating a network's actual demographics more compelling than a network's representation of its own demographics.

¹⁹³ *Initial Decision*, 26 FCC Red at 17172-73 ¶ 28.

¹⁹⁴ *Id.* at 17172-73 ¶ 28 & n.99; Tr. at 1598-99 (Michael Egan). Mr. Egan also employed a "look and feel" analysis in the earlier case. *WealthTV Recommended Decision*, 24 FCC Red at 12978 ¶ 23.

¹⁹⁵ *Initial Decision*, 26 FCC Red at 17173 ¶ 29; Tr. 1601 (Michael Egan); see Comcast Exh. 77 at 18-40 ¶¶ 29-66 (Testimony of Michael Egan).

¹⁹⁶ *Initial Decision*, 26 FCC Red at 17173 ¶ 29; Tr. 1616 (Michael Egan). In response to a question asking Mr. Egan if he ever saw Comcast perform "the kind of slicing of the data" that he performed in this case, Mr. Egan responded that he "wouldn't suspect they did what [he] did because [they] would not typically [perform that kind of analysis.] That wouldn't be the [typical] behavior of an MVPD" Tr. 1615 (Michael Egan).

¹⁹⁷ See *supra* ¶ 59.

¹⁹⁸ *Initial Decision*, 26 FCC Red at 17171 ¶ 26; Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 19-20 ¶ 42 (Testimony of Ken Solomon).

¹⁹⁹ *Comcast Exceptions* at 26-27.

Versus's "aggressive" image.²⁰⁰ We do not find the record to support any of the asserted network images. Egan's description of Tennis Channel as having an "international" image is based on "interstitial bits" about a minute or two in length that "might [talk] about what's going on in [a foreign city where a tournament is located]."²⁰¹ We do not find such brief segments of programming that are shown during tennis event coverage to convincingly establish Tennis Channel's image as "very international." Mr. Egan also attempts to demonstrate that Tennis Channel has a "very international" image by pointing to two network hosts, "a Latin-American woman" and an "Asian-American woman."²⁰² We find the suggestion that the on-air presence of two female professionals of color gives the Tennis Channel an image that is international rather than American to be completely unpersuasive. In arguing that Golf Channel has a "country club" image, Mr. Egan explains that he found the entire network to have that image because one program featured Donald Trump and another featured a conversation between "authoritative" hosts in front of a fireplace that "look[ed] like one of the rooms of a clubhouse of the Masters, Augusta."²⁰³ Not only is this evidence unpersuasive on its own terms, it is notable that Mr. Egan failed to explain why Tennis Channel, a network that carries a sport that is commonly associated with country clubs,²⁰⁴ did not project a similar "country club" image. Mr. Egan's proffered image of Versus as "aggressive" was limited to his analysis of the network's hunting and fishing programming, which comprises a fraction of its programming.²⁰⁵ Egan's analysis did not explain how the network's competitive sports programming, which includes basketball, minor league baseball, skiing, snowboarding, volleyball, diving, triathlon, and bicycling,²⁰⁶ contributes to an "aggressive" image. In fact, when Outdoor Life Network was rebranded as Versus, the network attempted to more closely associate itself with the sports that Mr. Egan's analysis does not consider and dissociate itself from the fishing and hunting that his analysis solely considers.²⁰⁷

67. Sixth, Comcast argues that the ALJ's rulings on discrimination and unreasonable restraint are inconsistent.²⁰⁸ It cannot be, Comcast asserts, that Tennis Channel can have succeeded enough in the marketplace to be similarly situated and yet have suffered from an unreasonable restraint on competition.²⁰⁹ What Comcast is attempting with this argument is to create a Catch-22 in which Tennis Channel is either similarly situated, in which case it is not harmed, or harmed, in which case it is not similarly situated. We reject this argument, and note that it amounts to an effort to effectively deprive Section 616 of its force. There is nothing inconsistent about a network attracting sufficient viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success in competing against those networks due to discrimination by an

²⁰⁰ *Initial Decision*, 26 FCC Red at 17173-74 ¶ 30; Tr. 1518, 1519, 1534-35 (Michael Egan).

²⁰¹ *Initial Decision*, 26 FCC Red at 17174 ¶ 31; Tr. 1518-19 (Michael Egan).

²⁰² *Initial Decision*, 26 FCC Red at 17174-75 ¶ 32; Tr. 1519 (Michael Egan).

²⁰³ *Initial Decision*, 26 FCC Red at 17175 ¶ 34; Tr. 1510, 1513-14 (Michael Egan).

²⁰⁴ *Initial Decision*, 26 FCC Red at 17175 ¶ 34; see Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer).

²⁰⁵ *Initial Decision*, 26 FCC Red at 17176 ¶ 35; Tr. 1534-35 (Michael Egan).

²⁰⁶ *Initial Decision*, 26 FCC Red at 17176 ¶ 36; see Tr. 1539-41 (Michael Egan); Comcast Cable Exh. 77 at 33-34 ¶ 57 (Testimony of Michael Egan).

²⁰⁷ See Tennis Channel Exh. 16 at 15 ¶ 27 (Testimony of Hal Singer).

²⁰⁸ *Comcast Exceptions* at 27-28.

²⁰⁹ *Id.*

MVPD with which those networks are affiliated.²¹⁰ For reasons discussed in detail below, we find that Tennis Channel did suffer an unreasonable restraint on its ability to compete fairly.

c. Comcast Differentially Treated Golf Channel, Versus, and Tennis Channel on the Basis of Affiliation

68. Comcast's differential treatment of Tennis Channel as compared to Golf Channel and Versus is not disputed. Comcast gives Golf Channel and Versus dramatically broader carriage than Tennis Channel. Comcast's decision to relegate Tennis Channel to the Sports Tier, which subscribers must pay an additional monthly fee to access, ensures that the network reaches far fewer of Comcast's subscribers. While the Golf Channel and Versus reach [REDACTED] of Comcast's subscribers, Tennis Channel reaches only [REDACTED].²¹¹

69. This vastly differential treatment, when weighed together with the similarly situated nature of the three networks and the general evidence that Comcast treats its affiliates like "siblings" and its non-affiliates like "strangers," provide sufficient evidence to support the finding that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, absent any persuasive evidence or argument that the reasons for the differential treatment were nondiscriminatory. We find each of Comcast's arguments that the basis for its differential treatment was nondiscriminatory unpersuasive for the reasons set forth below.

70. **Comcast's claim that other providers treated Golf Channel and Versus more favorably than Tennis Channel.** Comcast argues that its differential treatment of Tennis Channel as compared to Golf Channel and Versus cannot be the result of discrimination on the basis of affiliation because other MVPDs that are not affiliated with Golf Channel or Versus also treat Tennis Channel less favorably.²¹² Comcast relies on evidence that it carries Tennis Channel more broadly than other cable providers and that other MVPDs, including telephone and satellite companies, carry Golf Channel and Versus more broadly than Tennis Channel.²¹³

71. We do not find this argument compelling. The record, examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably than they are treated by other MVPDs. The record demonstrates that Comcast carries Tennis Channel at [REDACTED] of the average penetration rate at which it is carried by other MVPDs, including telephone companies and satellite MVPDs.²¹⁴ Tennis Channel's average penetration rate with the largest MVPDs, those that have at least two million subscribers, in the third quarter of 2010 [REDACTED] than its penetration rate on Comcast's systems.²¹⁵ Comcast attempts to tilt the data by narrowing the

²¹⁰ Furthermore, our methods of comparing the networks to see if they are similarly situated screen out some of the effect of the harm. For example, our comparison of the ratings of the networks only applies to ratings where the networks are carried. The three networks might have indistinguishable ratings, but they do not have an indistinguishable number of total viewers because Golf Channel and Versus are carried more broadly than Tennis Channel.

²¹¹ *Initial Decision*, 26 FCC Red at 17185-86 ¶ 54; see Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

²¹² *Comcast Exceptions* at 18-19.

²¹³ *Id.*

²¹⁴ *Initial Decision*, 26 FCC Red at 17191 ¶ 67; see Comcast Exh. 80 at 12, 26-29 ¶ 22 & Table 1A, 40 & Table 2B (Testimony of Jonathan Orszag); Tr. 1376-77 (Jonathan Orszag).

²¹⁵ *Initial Decision*, 26 FCC Red at 17191 ¶ 67; see Tennis Channel Exh. 16 at 40 ¶ 54 (Testimony of Hal Singer).

comparison to other cable operators.²¹⁶ However, elsewhere in its Exceptions, Comcast argues that its actions do not unreasonably restrain Tennis Channel's ability to compete because Comcast subscribers can always switch to other providers, like satellite, that carry Tennis Channel more broadly.²¹⁷ We think it is appropriate to view the market as a whole, and include in the comparison MVPDs that Comcast sees as its chief competitors.²¹⁸

72. In addition to evidence that other MVPDs carry Tennis Channel more broadly than Comcast, there is also evidence that other MVPDs carry Golf Channel and Versus less broadly than Comcast. Golf Channel and Versus are carried on Comcast at [REDACTED] respectively, than they are by other MVPDs.²¹⁹

73. Comcast is correct that other MVPDs generally carry Golf Channel and Versus more broadly than Tennis Channel. However, when viewed in light of Comcast's substantial market share and the fact that other MVPDs tend to treat Tennis Channel better, and Golf Channel and Versus worse, than Comcast, we find that this difference in carriage is best explained by the ripple effect that exists between MVPDs. The record establishes that one MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution.²²⁰ A major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely.²²¹ An MVPD's decision to narrowly distribute a network reduces the network's total subscribers, which lowers the licensing revenue it earns, reduces its ability to attract advertisers, and limits its ability to make the investments, such as raising revenue to purchase programming, that are necessary to compete with other sports networks.²²² A deprivation of access to subscribers by one MVPD thus can affect a network's overall standing and its ability to secure strong carriage deals with other MVPDs. The record illustrates this effect. MVPDs would often "inquire about Tennis Channel's level of carriage on Comcast" and would often follow

²¹⁶ *Comcast Exceptions* at 18-19.

²¹⁷ *Id.* at 9.

²¹⁸ *Initial Decision*, 26 FCC Rcd at 17191-92 ¶ 68. Comcast suggests that Tennis Channel's average level of carriage in the marketplace is inflated by DirecTV's carriage of Tennis Channel at [REDACTED] the penetration of the rest of the market, implying that this is the result of an equity-for-carriage deal between a network and its "parent company." See *Comcast Exceptions* at 19 n.80. We find the record shows that a minority equity interests in Tennis Channel was granted to DirecTV in exchange for forgoing the "free period" of service at the beginning of the contract term, not for broader carriage. Tennis Channel Exh. 14 at 4-5 ¶ 8 & n.3 (Testimony of Ken Solomon); Tr. 506-08 (Ken Solomon); see also *Initial Decision*, 26 FCC Rcd at 17192 n.232 (same finding of fact). In any event, the record fails to establish that DirecTV's level of carriage of Tennis Channel is discriminatory or otherwise improper and we see no compelling reason to exclude it from consideration. See also ¶ 74, *infra*. Comcast makes no attempt to argue that DISH's carriage of Tennis Channel likewise should be excluded from consideration. See Tr. 506-08 (Ken Solomon) (testifying that level of carriage was determined for both DirecTV and DISH, without regard to consideration of equity interests).

²¹⁹ *Initial Decision*, 26 FCC Rcd at 17191 ¶ 66; Tr. 1299-1300 (Jonathan Orszag).

²²⁰ *Initial Decision*, 26 FCC Rcd at 17189 ¶ 63; see Tr. 722-23 (Timothy Brooks); Tr. 1901-04 (Gregory Rigdon); Tennis Channel Exh. 16 at 41, 62-63, 70 ¶¶ 55, 89, 101 (Testimony of Hal Singer). When a network "gives a concession to a distributor that's visible, such as retiering rights, it's going to be used . . . [by] other distributors . . . as something they want." Tennis Channel Exh. 140 at 114 (Gregory Rigdon Deposition).

²²¹ Tr. 722 (Timothy Brooks); see Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

²²² Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon). See *infra* ¶ 83-84.

Comcast's lead, placing Tennis Channel in a more difficult negotiating position with those other MVPDs.²²³ This ripple effect is also reflected in carriage agreements, which sometimes include clauses that increase the level of penetration of a network as its aggregate subscriber count increases. For example, under their carriage agreement, [REDACTED].²²⁴ The record shows that Comcast itself recognized the existence of the ripple effect. Comcast executives were [REDACTED]²²⁵ [REDACTED].²²⁶ Comcast executives also noted that [REDACTED].²²⁷ We note that the nature of the ripple effect is such that the larger the MVPD, the greater the effect. Comcast serves almost a quarter of the MVPD market.²²⁸ Comcast's concerns about the ripple effect of the carriage decisions of [REDACTED], an MVPD a fraction of its size, make it very difficult for Comcast to argue, as it does here, that the existence of the ripple effect "flies in the face of common sense."²²⁹

74. We reject the argument that our analysis of Comcast's discriminatory conduct should not have relied on, among other evidence, the average penetration rate of Tennis Channel, Golf Channel, and Versus among other MVPDs, but instead should have used a comparison metric that Comcast itself never articulates in its Exceptions (*i.e.*, a comparison between Comcast's carriage and that of other MVPDs without any equity interest in Tennis Channel).²³⁰ We think it reasonable in assessing whether Comcast discriminated on the basis of affiliation to consider the treatment of the three networks at issue by the MVPD market in general, including Comcast's principal competitors, DirecTV and DISH—which are, after Comcast, the second and third largest MVPDs in the Nation. We disagree with the contention that we should have excluded those MVPDs from our comparison of penetration rates simply because they had an equity interest in Tennis Channel.²³¹ It is indisputable that the mere fact of vertical integration does not itself establish affiliation-based discrimination by the vertically integrated MVPD in favor of its affiliated network; were the opposite true, it would be sufficient to establish a violation of Section 616 that Comcast is affiliated with Golf Channel and Versus. Here, other than pointing to the satellite providers' equity interests in Tennis Channel, our dissenting colleagues identify no evidence that DirecTV and DISH must have given preferential treatment to Tennis Channel on the basis of its affiliated status.²³² Thus, we disagree with the assertion that it was improper to include carriage by those MVPDs in our comparative assessment of penetration rates; there has been no showing that the satellite providers'

²²³ Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

²²⁴ *Initial Decision*, 26 FCC Rcd at 17190 ¶ 64; Tennis Channel Exh. 14 at 5 ¶ 8 & n.4 (Testimony of Ken Solomon).

²²⁵ See Tennis Channel Exh. 16 at 40 & Table 6 (Testimony of Hal Singer).

²²⁶ *Initial Decision*, 26 FCC Rcd at 17190 ¶ 65; Tennis Channel Exh. 38 at COMTTC_00052319; see Tr. 1901-02 (Gregory Rigdon).

²²⁷ *Initial Decision*, 26 FCC Rcd at 17190 ¶ 65; Tennis Channel Exh. 38 at COMTTC_00052319.

²²⁸ *Comcast Exceptions* at 9.

²²⁹ *Id.* at 18. Comcast argues that "[i]f broad carriage of Tennis Channel truly were a valuable business opportunity, other sophisticated MVPDs would not blindly follow Comcast's lead if it were not in their own interests." *Id.* This argument entirely ignores the direct effect Comcast's carriage of Tennis Channel has on Tennis Channel's ability to compete for viewers, advertisers, and programming and thereby make itself more attractive to other MVPDs. As discussed in the following section, Comcast's narrow carriage of Tennis Channel has a dramatic effect on Tennis Channel's ability to compete in the MVPD carriage marketplace. See *infra* ¶ 83-84.

²³⁰ See Joint Dissenting Statement of Commissioners McDowell and Pai ("Joint Dissent").

²³¹ See *id.*

²³² See also n. 218, *supra*.

carriage decisions were unduly tainted by considerations of affiliation (as opposed to based on legitimate business considerations concerning the satellite providers' evaluations of the value and audience appeal of Tennis Channel).

75. Even were we to assume that the alternative metric proposed is the proper one (and even were we to exclude our comparison of penetration rates from our analysis), we would reach the same conclusion that Comcast discriminated on the basis of Tennis Channel's unaffiliated status based on the independent – and substantial – evidence discussed above. Among other record evidence, this includes the evidence that Comcast treats affiliates like “siblings” and non-affiliates like “strangers,” and Comcast's failure, discussed below, to engage in any actual cost-benefit analysis when confronted with Tennis Channel's carriage request. Further, the ripple effect, documented above, provides an explanation for similarities in carriage that is consistent with discrimination by Comcast. Our discussion of the ripple effect does not suggest that Comcast somehow has an obligation to improve Tennis Channel's standing through broader carriage.²³³ Instead, our point is simply that where other evidence indicates that Comcast's carriage decision vis-à-vis Tennis Channel was the result of discrimination, the limited carriage of that network by some other MVPDs (particularly other cable operators) may be, at least in part, attributable to Comcast's carriage decision. That is particularly so in light of Comcast's significant market share and the influence it wields in the MVPD market.²³⁴

76. **Comcast's alleged cost-benefit analysis.** Comcast argues that its carriage decision regarding Tennis Channel was based not upon discrimination, but upon a cost-benefit analysis that found that the substantial cost of broadly carrying Tennis Channel outweighed the benefits.²³⁵ Comcast asserts that Tennis Channel's proposal for wider distribution, if granted, would have substantially increased Comcast's costs through increased subscriber fees and reduced its Sports Tier revenue while providing no offsetting benefits.²³⁶ Comcast also points to a poll of its regional executives who initially reported little interest among subscribers for broader carriage of Tennis Channel, and previous surveys of customers that reported no consumer demand for Tennis Channel.²³⁷

77. We find Comcast's cost-benefit analysis irredeemably flawed. A cost-benefit analysis, as its name makes clear, must include examinations of both costs and benefits. The record shows that Comcast failed to consider the benefits of carrying Tennis Channel on a more widely distributed tier. The Comcast executive in charge of acquisitions who performed the analysis admitted in her testimony that she gave no thought to preparing an analysis of “what Comcast might have gained by moving The Tennis Channel to a more widely-distributed tier.”²³⁸ She failed to consider the advertising availabilities from

²³³ See Joint Dissent, *infra*.

²³⁴ We also disagree with the proposition that the ripple effect is “counteracted” by the possibility that Comcast's competitors may be able to lure away customers by distributing Tennis Channel more broadly. See Joint Dissent, *infra*. As an initial matter, we doubt that this understanding of MVPD competition—that customers will opportunistically switch MVPDs based upon a lower price for one particular channel, even including customers who watch Tennis Channel only intermittently—realistically reflects the way in which the MVPD marketplace works in practice. Furthermore, it is significant that Comcast's most direct competitors, the satellite providers, do in fact distribute Tennis Channel more broadly. As shown above, substantial evidence in this case confirms that both parties (including Comcast) have expressed concern about the ripple effect. See *supra* ¶ 73.

²³⁵ Comcast Exceptions at 13.

²³⁶ *Id.*

²³⁷ *Id.* at 14; Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski); Tr. 1881-82 (Greg Rigdon); Comcast Exh. 130; Tr. 2365-66 (Jennifer Gaiski).

²³⁸ Initial Decision, 26 FCC Red at 17195 ¶ 76 & n.251; Tr. 2439 (Jennifer Gaiski).

which Comcast might benefit and made no written analysis of the possibility of additional upgrades and subscribers if Tennis Channel were distributed more widely.²³⁹

78. Comcast's argument is also undermined by the evidence in the record that it did not consider repositioning, let alone perform a cost-benefit analysis of the impact of repositioning, Versus and Golf Channel at the time of their renewals in 2009 and 2010.²⁴⁰ If Comcast had performed a cost-benefit analysis in 2010, it would have found that broadly distributing Golf Channel and Versus cost Comcast [REDACTED], respectively.²⁴¹ The record shows that the cost of carrying Tennis Channel more broadly in 2009 was only [REDACTED].²⁴² In other words, Comcast would have paid substantially less to carry Tennis Channel broadly than it did to carry Golf Channel and Versus broadly.²⁴³

79. Comcast argues that the ALJ erred in that he discounted the cost-benefit analysis on the grounds that Comcast did not make a written or quantified analysis of the benefits of carrying Tennis Channel broadly.²⁴⁴ Comcast asserts that MVPDs are not required to document their carriage deliberations in writing, and argues that in any event there were no benefits to quantify.²⁴⁵ Comcast misreads the ALJ's opinion. The Initial Decision does not find Comcast's argument regarding its cost-benefit analysis unpersuasive on the basis of the analysis not being written down or on the basis that Comcast did not attach numbers to its examination of benefits. The Initial Decision finds Comcast's argument unpersuasive because Comcast made no attempt to analyze benefits at all.²⁴⁶ We find Comcast's cost-benefit analysis unpersuasive for the same reason.

80. We find Comcast's evidence that it made its decision based on data that indicated that its subscribers lacked interest in Tennis Channel to be unpersuasive. The record shows that when Comcast polled its regional executives regarding interest in Tennis Channel, it asked those executives to return in "a day or two" with updated findings following consultation with local system personnel.²⁴⁷ However, Comcast made its decision on Tennis Channel's carriage request the next day, before those executives had a reasonable opportunity to present their findings.²⁴⁸ Comcast's reliance on an incomplete poll in making its Tennis Channel carriage decision does not persuade us that the decision was nondiscriminatory. Even if Comcast had obtained the full results of the poll, Comcast's reliance on that information would be undermined by evidence in the record that Comcast had earlier overridden regional executives' decisions

²³⁹ *Initial Decision*, 26 FCC Red at 17195 ¶ 76 & n.252; Tr. 2414 (Jennifer Gaiski).

²⁴⁰ *Initial Decision*, 26 FCC Red at 17194 ¶ 74; Tr. 2226-28, 2297 (Madison Bond); Tr. 2409-10 (Jennifer Gaiski).

²⁴¹ *Initial Decision*, 26 FCC Red at 17196 ¶ 77 & n.257; Tr. 2218-19, 2221 (Madison Bond); Tr. 2376 (Jennifer Gaiski).

²⁴² *Initial Decision*, 26 FCC Red at 17196 ¶ 77 & n.257; Comcast Exh. 588; Tr. 2376 (Jennifer Gaiski).

²⁴³ Data from 2009 indicates that Tennis Channel's license-fee-per-rating point is [REDACTED]. Tennis Channel Exh. 16 at 32-33 ¶ 46 (Testimony of Hal Singer).

²⁴⁴ *Comcast Exceptions* at 16-17.

²⁴⁵ *Id.*

²⁴⁶ *Initial Decision*, 26 FCC Red at 17195 ¶ 76.

²⁴⁷ *Initial Decision*, 26 FCC Red at 17169-70 ¶ 21; Comcast Exh. 130; see Tr. 2367 (Jennifer Gaiski).

²⁴⁸ *Initial Decision*, 26 FCC Red at 17170 ¶ 21; Comcast Exh. 78 at 7 ¶ 17 (Testimony of Jennifer Gaiski).

to carry Tennis Channel more broadly as not being good business.²⁴⁹ In other words, Comcast had clearly indicated to its regional executives that it did not favor broad carriage of Tennis Channel, rendering the results of a “poll” of those executives unpersuasive.

81. We also reject Comcast’s argument that it relied on previous customer surveys in making its carriage decision with regard to Tennis Channel.²⁵⁰ Three of the four examples it cites are, in fact, not evidence related to customer surveys. Comcast cites testimony that in 2005, local systems answered an inquiry into whether there was an interest in carrying Tennis Channel more broadly by replying there was no interest in bearing the high license fees that accompanied broader carriage.²⁵¹ This occurred before Tennis Channel made improvements to its programming and increased its viewership.²⁵² Even so, Comcast’s local systems at the time expressed “some enthusiasm” for Tennis Channel’s programming.²⁵³ Comcast also cites handwritten notes from the 2009 meeting with regional personnel discussed above that we have already rejected as unpersuasive.²⁵⁴ Comcast further cites testimony indicating that one local system received no customer complaints when it moved Tennis Channel to the Sports Tier in 2007.²⁵⁵ This testimony is unhelpful because the event it describes occurred before the period when Tennis Channel alleges carriage on the Sports Tier was a result of discrimination. The only actual customer survey evidence Comcast cites is testimony by Greg Rigdon, Comcast’s current Executive Vice President of Acquisition and Content, that he reviewed consumer surveys in preparation to give testimony before the ALJ and found that there is “no consumer demand for [carrying Tennis Channel more broadly].”²⁵⁶ However, there is no evidence that those surveys were reviewed in connection with Comcast’s actual decisions about Tennis Channel’s carriage, including the reevaluation by Mr. Rigdon of Tennis Channel’s proposal in 2011.²⁵⁷

82. In light of these profound flaws in Comcast’s purported “cost-benefit” analysis, we cannot conclude that this analysis was the true basis of Comcast’s carriage decision as opposed to a strategy designed to insulate Comcast in litigation, especially when this evidence is weighed against the strong circumstantial evidence that Comcast’s decision was animated by discrimination on the basis of affiliation.²⁵⁸

²⁴⁹ *Tennis Channel Reply* at 30-31; Tennis Channel Exh. 48. See also Tr. 1877, 1878-79 (Gregory Rigdon); Tr. 2196-98 (Madison Bond).

²⁵⁰ *Comcast Exceptions* at 14; Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski); Tr. 1881-82 (Greg Rigdon); Comcast Exh. 130; Tr. 2365-66 (Jennifer Gaiski).

²⁵¹ Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski).

²⁵² See *supra* ¶ 12.

²⁵³ Comcast Exh. 78 at 3 ¶ 9 (Testimony of Jennifer Gaiski).

²⁵⁴ Comcast Exh. 130.

²⁵⁵ Tr. 2365-66 (Jennifer Gaiski).

²⁵⁶ Tr. 1881-82 (Greg Rigdon).

²⁵⁷ *Id.* at 1883-85.

²⁵⁸ See *Initial Decision*, 26 FCC Red at 17170 ¶ 22. Comcast also argues that the Initial Decision ignored evidence that demonstrates that changes in market conditions over time, not affiliation-based discrimination, guided its carriage decisions. *Comcast Exceptions* at 22. We have already examined this argument and rejected it as unpersuasive. See *supra* ¶ 57.

3. The ALJ Properly Found that Comcast's Treatment of Tennis Channel Unreasonably Restrains Tennis Channel's Ability to Compete

83. We find that Comcast's discriminatory treatment of Tennis Channel unreasonably restrained Tennis Channel's ability to compete in the marketplace. The record indicates that if Comcast had not relegated Tennis Channel to the Sports Tier and instead provided Tennis Channel with penetration equivalent to that of Golf Channel and Versus, the network would have approximately [REDACTED] additional subscribers.²⁵⁹ The record also suggests that this gain would likely have been even greater once the "ripple effect" is taken into account.²⁶⁰ Rather than provide Tennis Channel with broad distribution, Comcast placed the network onto a tier that reaches only [REDACTED] of its subscribers.

84. Comcast's placement of Tennis Channel affected its ability to compete in a variety of direct and indirect ways. Tennis Channel collects less in licensing fees than it would if it reached more MVPD subscribers,²⁶¹ cutting into the network's largest source of revenue.²⁶² The limitation on Tennis Channel's audience size and the reduction in Tennis Channel's income make it difficult for the network to acquire programming rights.²⁶³ Comcast's limited distribution of Tennis Channel has also discouraged advertisers from placing advertisements on the network and consequently reduced advertising revenues.²⁶⁴ We are persuaded by the evidence that Tennis Channel's limited distribution is "the single most prevalent reason" that advertisers give for not placing ads on the network, as it situates the network below the 40 million subscriber threshold that the advertising industry uses to determine the placement of national ads.²⁶⁵ [REDACTED] have all declined to place ads on Tennis Channel on a regular basis in recent years because of the network's limited distribution.²⁶⁶ [REDACTED] have only placed advertising on Tennis Channel during freeview periods when its subscriber count has risen to over the 40 million subscriber threshold.²⁶⁷ The record provides evidence that Tennis Channel would have grown to

²⁵⁹ *Initial Decision*, 26 FCC Red at 17198 ¶ 82; Tr. 2096-97 (Madison Bond); Comcast Exh. 588.

²⁶⁰ *Initial Decision*, 26 FCC Red at 17198 ¶ 82; see *supra* ¶ 73.

²⁶¹ *Initial Decision*, 26 FCC Red at 17198 ¶ 83; Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

²⁶² *Initial Decision*, 26 FCC Red at 17198 ¶ 83; Tr. 298 (Ken Solomon).

²⁶³ *Initial Decision*, 26 FCC Red at 17199-17200 ¶ 86; Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon); see also Tennis Channel Exh. 17 at 33 ¶ 65 (Testimony of Timothy Brooks). The record shows that Tennis Channel was unable to acquire the rights to telecast tennis event programming such as [REDACTED] as a consequence of its limited distribution. Tennis Channel Exh. 14 at 18 ¶ 40 (Testimony of Ken Solomon).

²⁶⁴ *Initial Decision*, 26 FCC Red at 17201 ¶¶ 90, 91; Tr. 592-93 (Gary Herman); Tennis Channel Exh. 15 at 6, 9 ¶¶ 14, 24 (Testimony of Gary Herman).

²⁶⁵ *Initial Decision*, 26 FCC Red at 17201 ¶ 90; see Tr. 592 (Gary Herman); Tennis Channel Exh. 15 at 5 ¶ 11 (Testimony of Gary Herman).

²⁶⁶ *Initial Decision*, 26 FCC Red at 17201 ¶ 90; Tennis Channel Exh. 15 (Testimony of Gary Herman) at 6-7, 8 (¶¶ 16-17, 20).

²⁶⁷ *Initial Decision*, 26 FCC Red at 17201 ¶ 90; see Tennis Channel Exh. 15 (Testimony of Gary Herman) at 7-8 (¶¶ 17-18). A freeview is "[a] period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers." *Initial Decision*, 26 FCC Red at 17217.

[REDACTED] subscribers,²⁶⁸ exceeding the 40 million subscriber threshold and likely attracting more national advertisers, had Comcast not limited the network's distribution. These harms are of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks.

85. Tennis Channel was also unreasonably restrained in its ability to compete by Comcast's discrimination on the basis of affiliation in favor of Golf Channel and Versus.²⁶⁹ Golf Channel and Versus are substantially similar to Tennis Channel, particularly in demographics and advertising.²⁷⁰ As a result, those networks compete for viewers and advertisers. Because limiting the distribution of Tennis Channel shrinks the network's potential audience and discourages advertising placements, Golf Channel and Versus are effectively provided with a competitive advantage. Versus also competes directly with Tennis Channel for programming rights and therefore directly benefits from the difficulties in acquiring programming rights that Tennis Channel faces as a consequence of more limited carriage,²⁷¹ a detrimental effect that even Comcast executives have acknowledged.²⁷² The record shows that Golf Channel and Versus receive benefits because of affiliation with Comcast, such as Comcast ensuring favorable channel placement and sufficient distribution of Versus to protect its National Hockey League programming rights,²⁷³ that provide further advantages to those networks' ability to compete against Tennis Channel. The advantages that Comcast provides to its affiliated networks, both directly and through its carriage decisions, support our finding that Comcast's discrimination against Tennis Channel was unreasonable and restrained Tennis Channel's ability to compete in the marketplace.

86. Comcast argues that Tennis Channel failed to provide any evidence that its ability to compete was unreasonably restrained.²⁷⁴ It asserts that the harms to Tennis Channel described above are simply the negative consequences that follow from any network's inability to obtain broader carriage, which are insufficient to show unreasonable restraint under Comcast's interpretation of Section 616.²⁷⁵ As we have stated above, we do not find Comcast's narrow interpretation of Section 616 to be persuasive as it is inconsistent with the section's legislative history, and we instead embrace a straightforward and textual reading of Section 616.²⁷⁶ That standard, requiring that the discrimination be unreasonable and

²⁶⁸ *Initial Decision*, 26 FCC Red at 17198 ¶ 82; see Tr. 2096 (Madison Bond); Tennis Channel Exh. 14 at 3 ¶ 8 (Testimony of Ken Solomon); Comcast Exh. 588.

²⁶⁹ Indeed, the differential between Comcast's distribution of Tennis Channel, on the one hand, and Golf Channel and Versus, on the other, is alone enough to establish that Comcast's discrimination on the basis of affiliation unreasonably restrained Tennis Channel's ability to compete.

²⁷⁰ See *supra* ¶¶ 53-54.

²⁷¹ See *Initial Decision*, 26 FCC Red at 17199-17200 ¶ 86-88; Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 20 ¶ 42 (Testimony of Ken Solomon).

²⁷² *Initial Decision*, 26 FCC Red at 17200 ¶ 88; Tennis Channel Exh. 143 at 53-54 (Jeffrey Shell Deposition).

²⁷³ *Initial Decision*, 26 FCC Red at 17188-89 ¶¶ 60, 61; Tennis Channel Exh. 55; Tr. 2270-75 (Madison Bond); Tennis Channel Exh. 84; Tr. 2393-98 (Jennifer Gaiski).

²⁷⁴ *Comcast Exceptions* at 7.

²⁷⁵ *Id.*

²⁷⁶ See *supra* ¶ 43.

have a restraining effect on the programmer's ability to compete in the MVPD distribution marketplace, is satisfied here. We further reject Comcast's contention that the harms in this case are "highly generalized and speculative" and the sort that will "be present in every case in which a network seeks broader distribution by an MVPD."²⁷⁷ The harms inflicted upon Tennis Channel were not simply the consequence of its inability to obtain broader carriage, but as the entirety of the evidence in the record demonstrates, were a consequence of Comcast's discrimination in favor of its own similarly situated affiliates with which Tennis Channel competes for advertisers, audience, and, in the case of Versus, programming. Because Comcast is the nation's largest MVPD, that harm amounted to a loss of access to [REDACTED] subscribers.²⁷⁸

87. Comcast makes two additional arguments to suggest that Tennis Channel was not unreasonably restrained by Comcast's decision to give Tennis Channel inferior carriage to Golf Channel and Versus. First, Comcast argues that its carriage of Tennis Channel on any tier belies the suggestion that Comcast unreasonably restrains Tennis Channel's ability to compete in the marketplace.²⁷⁹ We reject this argument for the same reasons as it was rejected in the Initial Decision.²⁸⁰ As the record shows, only [REDACTED] of Comcast subscribers pay the additional fee required to access the Sports Tier.²⁸¹ This low percentage suggests that Tennis Channel's placement on the Sports Tier serves as a barrier to access by Comcast subscribers. Furthermore, Comcast's unreasonably preferential treatment of Golf Channel and Versus gave those networks a competitive advantage over Tennis Channel. Second, Comcast argues that even if it did not carry Tennis Channel at all, Comcast customers amount to less than 24 percent of the MVPD market, leaving the rest of the market open to Tennis Channel.²⁸² We reject this argument as well. Comcast is the nation's largest MVPD. It directly represents nearly 24 percent of the market,²⁸³ and has even greater influence on the market due to the ripple effect.²⁸⁴ As we found in a previous proceeding, "Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming."²⁸⁵ In addition to serving almost a quarter of all homes in the United States, Comcast dominates seven of the top ten MVPD markets, and has a substantial presence in an eighth market.²⁸⁶ For example, Comcast has a 62 percent share of the Chicago Designated Market Area and a 67 percent share of the Philadelphia Designated Market Area.²⁸⁷ Comcast also holds more than 40 percent of

²⁷⁷ *Comcast Exceptions* at 10.

²⁷⁸ *Initial Decision*, 26 FCC Red at 17198 ¶ 82; Tr. 2096-97 (Madison Bond); Comcast Exh. 588.

²⁷⁹ *Comcast Exceptions* at 9.

²⁸⁰ *Initial Decision*, 26 FCC Red at 17199 ¶ 84.

²⁸¹ *Initial Decision*, 26 FCC Red at 17198-99 ¶ 83; Comcast Exh. 78 at 2 ¶ 4 (Testimony of Jennifer Gaiski).

²⁸² *Comcast Exceptions* at 9.

²⁸³ Tennis Channel Exh. 13, *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Red 4238, 4284-85 ¶ 116 (2011) ("Comcast-NBCU").

²⁸⁴ *See supra* ¶ 73.

²⁸⁵ *Comcast-NBCU*, 26 FCC Red at 4238, 4284-85 ¶ 116.

²⁸⁶ Tennis Channel Ex. 16 at 69 ¶ 101 (Testimony of Hal Singer); Tennis Channel Ex. 15 at 5-6 (¶¶ 13-14) (Testimony of Gary Herman).

²⁸⁷ *Comcast-NBCU*, 26 FCC Red at 4285 ¶ 116.

the market in 13 of the 20 largest markets.²⁸⁸ We have found before that Comcast's extensive reach potentially allows it to reduce "the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits."²⁸⁹ An MVPD that discriminates against a video programming vendor by limiting the vendor's access to nearly a fourth of the entire market and to a significant percentage of subscribers in major regional markets, while by giving similarly situated affiliated competitor networks broad access is clearly restraining the vendor's ability to compete.²⁹⁰

4. An Equal Carriage Remedy is Appropriate and Authorized under Section 616

88. Comcast argues that the remedy ordered in the Initial Decision goes beyond the harms asserted by Tennis Channel.²⁹¹ Relieving the competitive injury allegedly inflicted upon Tennis Channel, Comcast asserts, does not require the network to be granted channel placement equal to that of Golf Channel and Versus.²⁹² Comcast believes that the Initial Decision fails to find injury based on channel placement, fails to analyze how the repositioning remedy would redress Tennis Channel's injury, and fails to consider the complexity and burden that Comcast faces in repositioning "even a single channel on each of the distinct channel lineups on Comcast's hundreds of cable systems."²⁹³ Comcast also argues that the remedy ordered by the ALJ in the Initial Decision goes beyond rectifying harms by compelling Comcast to pay additional sums for broader carriage of Tennis Channel.²⁹⁴ Comcast insists that such a result is not in the public interest.²⁹⁵

89. As discussed in detail above, we find that the record clearly supports the ALJ's conclusion that Tennis Channel was unreasonably restrained in its ability to compete by receiving significantly narrower carriage than Golf Channel and Versus.²⁹⁶ Tennis Channel's competitive disadvantage against Golf Channel and Versus would be directly relieved if Comcast provided Tennis

²⁸⁸ *Id.* at 4285 n.275.

²⁸⁹ *Id.* at 4285 ¶ 116.

²⁹⁰ Our conclusion that Comcast's discrimination on the basis of affiliation unreasonably restrains Tennis Channel's ability to compete fairly is based upon Comcast's relegation of Tennis Channel to its Sports Tier. We offer no opinion as to whether this prong of Section 616 would be satisfied had Comcast instead placed Tennis Channel on a tier, such as the Digital Preferred Tier, with broader carriage than the Sports Tier but narrower carriage than the Digital Basic Tier. (We do not see how this observation constitutes any concession, let alone a "major concession." Joint Dissent, *infra*. All we say here is that if Comcast had carried Tennis Channel more broadly, the question whether Tennis Channel was unreasonably restrained in its ability to compete would be a different one and might yield a different answer. We think it appropriate and prudent to focus our conclusions on the facts at hand, rather than speculating on the proper analysis of facts not presented in this case. That particularly makes sense because Comcast does not attempt to address what the impact of its conduct would be if it instead had placed Tennis Channel on a tier with broader carriage than the Sports Tier but one with narrower carriage than the Digital Basic Tier.)

²⁹¹ *Comcast Exceptions* at 38.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 39.

²⁹⁵ *Id.*

²⁹⁶ See *supra* ¶¶ 83-87.

Channel with equal carriage. With equal carriage, Tennis Channel would be able to compete against Golf Channel and Versus on equal footing for content, advertisers, and viewers. Furthermore, without the ripple effect of Comcast's narrow carriage of Tennis Channel on the basis of affiliation, Tennis Channel will be in a better position to compete for broader carriage on the systems of other MVPDs.

90. We are also not persuaded by Comcast's argument that it should not have to pay Tennis Channel for broader carriage. As an initial matter, the remedy only requires Comcast to provide Golf Channel and Tennis Channel with equal carriage. Comcast could comply with this remedy without providing Tennis Channel broader carriage. To the extent that Comcast makes the decision to comply by moving Tennis Channel to a more broadly distributed tier, then Comcast is effectively deciding that channels situated similarly to Golf Channel and Versus are most appropriately carried at a broader tier. Comcast and Tennis Channel already agreed in their contract how Tennis Channel should be compensated if it is carried on a broader tier.²⁹⁷ Tennis Channel has not argued that those terms are discriminatory, and we see no reason to relieve Comcast of its contractual obligations.

91. We do, however, agree with Comcast that the record does not sufficiently establish that Tennis Channel's ability to compete fairly was unreasonably restrained by its channel placement. In June 2009, when Tennis Channel sought broader carriage from Comcast, it did not seek better channel placement. In the proceedings before the ALJ, Tennis Channel never sought better channel placement as a remedy. Because channel placement was not at the heart of the dispute between Comcast and Tennis Channel, and because Tennis Channel did not seek better channel placement as a remedy, the record on the effect of Tennis Channel's placement was underdeveloped. Comcast also makes a compelling argument that the ALJ failed to consider adequately the burden of repositioning Tennis Channel.²⁹⁸ As a matter of common sense, it seems reasonable to assume that Comcast's placement of Tennis Channel in the upper reaches of its system hampers Tennis Channel's ability to attract viewers, while Comcast's placement of both Golf Channel and Versus within a few channels of ESPN helps their ability to attract viewers. That said, Tennis Channel did not significantly develop this issue and did not seek this remedy, and therefore we disagree with the ALJ that equitable channel placement is an appropriate remedy based on the record developed in this case.

92. Though we find the equal carriage portion of the ALJ remedy appropriate, we find it necessary to clarify it in some key respects. To satisfy the equal carriage requirement, Comcast must carry Tennis Channel on the same distribution tier, reaching the same number of subscribers, as it does Golf Channel and Versus.²⁹⁹ The ALJ did not prescribe specific license fees, and we decline to do so here. However, this does not mean that Comcast has no obligations under this Order with regard to license fees. As indicated above, to the extent that Comcast moves Tennis Channel to a more broadly distributed tier, Comcast must pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated. To the extent the existing contract does not state how Tennis Channel should be compensated for broader carriage, we expect the parties to negotiate appropriate pricing terms.³⁰⁰

5. The Requirement to Carry Tennis Channel on Equal Terms with Golf

²⁹⁷ See Tennis Channel Exh. 144 at 6 ¶ 5.1.

²⁹⁸ Comcast Exceptions at 38.

²⁹⁹ For the reasons stated in the Initial Decision, our remedy excludes parity on analog systems where the addition of Tennis Channel would require displacement of existing networks. *Initial Decision*, 26 FCC Rcd at 17211 ¶ 119 & n.353.

³⁰⁰ Comcast does not offer any Exception to the ALJ's forfeiture order except for its general Exceptions to the conclusion that Comcast violated Section 616. We therefore do not independently review the forfeiture order here.

Channel and Versus is Consistent with the First Amendment

93. Comcast argues that the remedy ordered in the Initial Decision, and by extension the remedy ordered below, is a content-based speech restriction that violates its First Amendment rights.³⁰¹ Comcast contends that the “similarly situated” analysis depends upon an assessment of the content of Golf Channel, Versus, and Tennis Channel. Because the analysis compares Comcast’s treatment of Tennis Channel with the treatment it accorded to its affiliated networks (Golf Channel and Versus), Comcast argues that the remedy imposed is the product of a content-based restriction on its speech and therefore is subject to strict scrutiny.³⁰² Comcast further contends that the remedy must be invalidated because it does not survive strict scrutiny.³⁰³

94. As explained below, while we agree with Comcast that the remedy imposed implicates its First Amendment rights, the carriage requirement is not content-based and therefore is subject to intermediate (rather than strict) scrutiny. Because the carriage requirement easily survives intermediate scrutiny review, we find that it is valid under the First Amendment.

95. Though Comcast styles its First Amendment arguments as taking issue with our analysis and remedy, its arguments effectively amount to a frontal assault on the constitutionality of Section 616. Comcast’s First Amendment discussion takes issue with two aspects of the Initial Decision that we affirm here. First, Comcast argues that the “similarly situated” analysis violates the First Amendment. In making this argument, Comcast argues that the “similarly situated” analysis is “entirely untethered from the statutory text and Congress’s intent.”³⁰⁴ But this is not accurate. Section 616 clearly speaks in terms of prohibiting discrimination. Admitting evidence of disparate treatment of similarly situated parties as circumstantial evidence supporting a showing of intentional discrimination is a hallmark of discrimination law.³⁰⁵ Congress intended this kind of analysis to be applied under Section 616. As the House Report notes: “An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents.”³⁰⁶

³⁰¹ *Comcast Exceptions* at 30-38.

³⁰² *Id.* at 32-35. *See also id.* at 20-22.

³⁰³ *Id.* at 35-38.

³⁰⁴ *Id.* at 21.

³⁰⁵ *See, e.g., Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351 (6th Cir. 1998) (“[A] plaintiff . . . establishes a prima facie case of age discrimination when he or she produces evidence demonstrating that . . . 4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination.”); *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (“Disparate treatment claims can be proven using direct evidence . . . or circumstantial evidence. . . . To establish a prima facie case for disparate treatment in a race discrimination case, the plaintiff must show that . . . (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated . . .”).

³⁰⁶ *House Report* at 110. Comcast argues that the “similarly situated” analysis “is indistinguishable from the common-carrier discrimination standard that Congress rejected as inappropriate for Section 616 claims.” *Comcast Exceptions* at 21. But employing a “similarly situated” analysis when analyzing discrimination is a far cry from imposing a common carriage requirement. The Initial Decision did not stop its analysis after concluding that Tennis Channel, Golf Channel, and Versus were similarly situated but treated differently. Instead, the Initial Decision reviewed additional evidence that Comcast discriminates on the basis of affiliation, reviewed and rejected Comcast’s various non-discriminatory explanations for its differential treatment, and made an independent determination that Tennis Channel was unreasonably restrained from competing fairly. *Initial Decision*, 26 FCC Red at 17185-17202 ¶¶ 53-92.

96. Second, Comcast argues that its speech rights are implicated by the remedy's requirement to carry Tennis Channel so long as it chooses to carry Golf Channel and Versus.³⁰⁷ Again, Comcast's issue is really with Section 616 more than with our remedy. Section 616 bars discrimination "*in the selection, terms, or conditions for carriage of video programming.*"³⁰⁸ On its face, Section 616 clearly prohibits certain "editorial decisions" not to carry particular channels. Comcast's complaint that the remedy infringes on its "editorial decisions" is really a complaint about Section 616's discrimination prohibition, not the particular remedy ordered here.

a. The Requirement to Provide Tennis Channel with Equal Carriage to Golf Channel and Versus is Subject to Intermediate Scrutiny

97. While we conclude that Comcast's First Amendment arguments generally lack merit, we agree with Comcast's threshold contention that the remedy—which requires Comcast to provide carriage to Tennis Channel on terms as favorable as those provided to Golf Channel and Versus—implicates Comcast's First Amendment rights. The ALJ concluded otherwise based on the rationale that Comcast remained free not to carry Tennis Channel if it chose to no longer carry Golf Channel and Versus.³⁰⁹ We find that the ALJ erred in this limited respect. Comcast's First Amendment rights are implicated by our carriage remedy because Comcast is entitled, in the exercise of its editorial discretion, to choose to carry Golf Channel and Versus. Should it exercise that choice, our remedy requires Comcast to carry Tennis Channel. Thus, the remedy affects Comcast's authority to determine the composition of networks on its cable systems—a result that, under established law, has been recognized as implicating the First Amendment.³¹⁰

98. That the remedy at issue implicates Comcast's First Amendment rights does not mean that it is subject to strict scrutiny, however. As the Supreme Court has explained in the context of required carriage by a cable system, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."³¹¹ In *Time Warner Entertainment v. FCC (Time Warner)*, the D.C. Circuit found that intermediate scrutiny applied to section 19 of the Cable Television Consumer Protection and Competition Act (1992 Act), which prohibits cable operators from discriminating in the sale or delivery of affiliated cable networks.³¹² As the D.C. Circuit explained, "[T]hese provisions are

³⁰⁷ *Comcast Exceptions* at 31.

³⁰⁸ 47 U.S.C. § 536(a)(3) (emphasis added).

³⁰⁹ According to the ALJ, "the proposed remedy requires only elimination of discrimination in carriage between Tennis Channel and the two Comcast affiliates, without dictating how any of the three networks are to be carried, or not carried." *Initial Decision*, 26 FCC Rcd at 17205 ¶ 103.

³¹⁰ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). For this reason, we reject Tennis Channel's argument that Comcast has not articulated any speech interest implicated by the Initial Decision because Comcast already carries Tennis Channel on its systems. *Tennis Channel Reply* at 33. As explained above, settled law establishes that the First Amendment is implicated where, as here, a carriage requirement limits the editorial discretion of a cable operator to select the composition of networks on its cable system. See *Turner I*, 512 U.S. at 636-37. Tennis Channel is therefore incorrect in asserting that the Initial Decision only effectively limits Comcast's authority to charge a fee to its subscribers who want to watch Tennis Channel. *Tennis Channel Reply* at 33. The remedy imposed requires carriage on terms equivalent to those provided to Comcast's affiliated networks and, in so providing, impacts Comcast's selection of networks on its cable systems. This conclusion is consistent with our 2011 rulemaking order, which concedes that the First Amendment is implicated but says that intermediate scrutiny applies. *Program Carriage Order and NPRM*, 26 FCC Rcd at 11517-18 ¶ 32.

³¹¹ *Turner I*, 512 U.S. at 642.

³¹² *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 977-78 (D.C. Cir. 1996).

content-neutral on their face, regulating cable programmers and operators on the basis of the ‘economics of ownership,’ a characteristic unrelated to the content of speech.”³¹³ The government’s interest was “the promotion of fair competition in the video marketplace,” a goal that “both furthers an important government interest and is unrelated to the suppression of free expression.”³¹⁴

99. The application of intermediate scrutiny to a required-carriage remedy under Section 616 follows inexorably from *Time Warner*. Like the provision at issue in *Time Warner*, the program carriage provision (and the Commission’s implementing rule) regulate anticompetitive conduct not on the basis of content, but rather on the basis of affiliation— the “economics of ownership.” Our recent *Program Carriage Order and NPRM* precisely spelled out the connection between *Time Warner* and Section 616:

The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based. The court held that the leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator. The same conclusion applies to the program carriage provision of the 1992 Cable Act, which prevents MVPDs from demanding exclusivity or financial interests from, or discriminating on the basis of affiliation with respect to, unaffiliated programming vendors and, accordingly, regulates speech based on affiliation with an MVPD, not based on its content. The court held in *Time Warner* that the provisions of the 1992 Cable Act that regulate speech based on affiliation are subject to intermediate scrutiny and are constitutional if the government’s interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim. The *Time Warner* court found that there are substantial government interests in promoting diversity and competition in the video programming market. The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs. Moreover, because MVPDs have an incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors. Thus, like the leased access rules, the program carriage rules would be subject to, and would withstand, intermediate scrutiny.³¹⁵

100. Comcast argues that the remedy at issue is a content-based restriction insofar as it is the product of “similarly situated” analysis, which involves a “detailed comparison of the three networks’ content.”³¹⁶ That argument, however, misunderstands the concept of a “content-based” regulation under First Amendment doctrine. As the Supreme Court explained in *Turner I*, the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”³¹⁷ That is clearly not the case here. Here,

³¹³ *Id.* at 977.

³¹⁴ *Id.* at 978.

³¹⁵ *Program Carriage Order and NPRM*, 26 FCC Red at 11517-18 ¶ 32 (internal citations omitted).

³¹⁶ *Comcast Exceptions* at 33.

³¹⁷ *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). See also *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (“Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’”).

we have considered the content of the three networks solely for purposes of conducting a comparative analysis to determine whether Comcast discriminated “on the basis of affiliation or nonaffiliation” by affording preferential treatment to affiliated networks that are similarly situated to Tennis Channel. The *particular* content of the programming at issue was irrelevant; the same comparative analysis would apply regardless of the specific type of programming involved. Moreover, we considered the relevant programming as merely one element of a series of factors (none of which was independently dispositive) to determine whether the three networks were similarly situated. Thus, nothing in our approach, or the statutory provision and Commission rule that undergirded it, favors or disfavors any particular speech “because of [agreement or] disagreement with the message it conveys.”³¹⁸ Indeed, courts have upheld regulations that *do*, on their face, differentiate based on content when the regulations are justified by content-neutral reasons. Although such regulations “‘might in a formal sense be described as content-based’ given that they are triggered by whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas.”³¹⁹ Here, our carriage remedy is justified by the goals of promoting diversity and competition in the video programming market, precisely the same content-neutral reasons upheld in *Time Warner*.³²⁰

101. The cases on which Comcast relies only confirm this conclusion. Comcast repeatedly cites cases in which the challenged regulation was specifically designed to favor or disfavor certain kinds of content. For example, in *Miami Herald Publishing Co. v. Tornillo*, the regulation at issue burdened a newspaper’s ability to publish content criticizing a candidate for nomination or election by compelling the newspaper to publish a contrary message that effectively neutralized its own advocacy.³²¹ *Arkansas Writers’ Project, Inc. v. Ragland* is similarly inapposite. There, the challenged regulation singled out the press for unfavorable treatment by taxing some magazines but not others expressly based on content.³²² Nothing in the our decision, or the underlying program carriage statute and the Commission’s implementing rule, differentiates among networks on the basis of content, as opposed to on the basis of affiliation, which the courts have concluded to be content-neutral “economics of ownership.”

102. Because we conclude that Section 616’s application in this case was content-neutral, we review that application under intermediate scrutiny.

b. The Equal Carriage Requirement Satisfies Intermediate Scrutiny

103. Under intermediate scrutiny, the equal carriage requirement is permissible “if the government’s interest is important or substantial and the means chosen to promote that interest do not

³¹⁸ *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). See also *Ward*, 491 U.S. at 791 (“The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”)

³¹⁹ *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011).

³²⁰ Comcast argues that the ALJ “engage[d] in viewpoint-based analysis, signaling strong disapproval of Golf Channel’s coverage of the Masters Tournament.” *Comcast Exceptions* at 34. We agree that it would raise very significant First Amendment concerns if a carriage requirement were animated by approval or disapproval of a network’s content. We do not read any of the ALJ’s conclusions to turn on his views of any of the three networks’ sports coverage or other content, and in any event we do not rely on such factors in reaching our conclusions here.

³²¹ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); *Comcast Exceptions* at 30, 32.

³²² *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Comcast Exceptions* at 21, 32, 33.

burden substantially more speech than necessary to achieve the aim.”³²³ The equal carriage requirement easily satisfies this standard.

104. As noted above, the purpose of Section 616 is to promote competition and diversity in the video programming market and address concerns about vertical integration of MVPDs and programmers.³²⁴ Congress was concerned that vertical integration gives MVPDs the incentive and ability to favor their affiliated programming services.³²⁵ Both the Supreme Court and the D.C. Circuit have held that promoting competition in the video programming distribution market is an important or substantial government interest.³²⁶ As the D.C. Circuit explained, “the government’s interest in regulating vertically integrated programmers and operators is the promotion of fair competition in the video marketplace. According to [the Supreme Court in] *Turner*, this goal both furthers an important government interest and is unrelated to the suppression of free expression.”³²⁷ We further note that the equal carriage requirement does not burden substantially more speech than necessary. To begin with, section 616 ties our authority to order a remedy to our determination that discrimination unreasonably restrained Tennis Channel’s ability to compete fairly. It is built into the structure of the statute that we must find that Congress’s substantial interest would actually be served by a remedy before a remedy is permissible. Furthermore, the equal carriage requirement only requires Comcast to carry Tennis Channel to the extent it carries networks we have found to be similarly situated. In other words, the remedy requires no more than that Tennis Channel not be carried in a discriminatory manner, and does not burden substantially more speech than necessary to achieve that end.

105. Comcast argues that “the basis for the government’s interests has disappeared” due to changes in the marketplace.³²⁸ But as we recently observed, “[i]n the program carriage discrimination provision. . . Congress directed the Commission to assess on a case-by-case basis the impact of anticompetitive conduct on an unaffiliated programming vendor’s ability to compete. These nationwide figures [showing increased competition in the video programming market] do not undermine Congress’s finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly.”³²⁹ In this case, for reasons discussed above, the ALJ found that Comcast discriminated on the basis of affiliation, and that this discrimination unreasonably restrained the ability of Tennis Channel to compete. If those conclusions are correct, as we find they are, it does not follow that there is no longer any harm that the government has an important or substantial interest in addressing.³³⁰ If an MVPD lacked the ability to limit competition through discrimination based

³²³ *Time Warner*, 93 F.3d at 969.

³²⁴ See *supra* ¶¶ 42-43; *Program Carriage Order and NPRM*, 26 FCC Red at 11497-98 ¶ 4 (citing *House Report* and *Senate Report*).

³²⁵ *Senate Report* at 25.

³²⁶ See *Turner I*, 512 U.S. at 662-63; *Time Warner*, 93 F.3d at 978.

³²⁷ *Time Warner*, 93 F.3d at 978.

³²⁸ *Comcast Exceptions* at 35-36.

³²⁹ *Program Carriage Order and NPRM*, 26 FCC Red at 11518-19 ¶ 33.

³³⁰ Comcast’s argument that the marketplace has changed largely turns upon its assertion that the government’s interest in promoting competition and diversity in the video-programming market is limited to concerns about cable operators exercising “bottleneck, or gatekeeper, control.” *Comcast Exceptions* at 36 (quoting *Turner I*, 512 U.S. at 656). That argument is at odds with the text of Section 616, which applies to all MVPDs and not just cable operators. Furthermore, we do not believe that the changes to the marketplace are as meaningful as Comcast (continued...)

on affiliation, then the elements of a Section 616 violation would not be satisfied.

106. Comcast also argues that the carriage requirement does not actually further the government's objective of promoting competition and diversity because the remedy leaves Comcast free to drop Tennis Channel, so long as it also drops Golf Channel and Versus.³³¹ We find no merit in it. The carriage requirement is designed to remedy discrimination by Comcast on the basis of affiliation. It is grounded in a determination that Comcast favored Golf Channel and Versus and disfavored Tennis Channel on the basis of affiliation, and that this differential treatment hindered Tennis Channel's ability to compete with Golf Channel and Versus for audience, advertisers, and events. By requiring Comcast to provide the three channels with equal carriage, the remedy enables Tennis Channel to compete fairly with Golf Channel and Versus, thereby furthering Section 616's goals of promoting competition and diversity in the marketplace.

IV. CONCLUSION

107. For the reasons stated above, we conclude that Tennis Channel has demonstrated that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, and that this discrimination unreasonably restrained Tennis Channel's ability to compete in violation of Section 616 of the Communications Act and Section 76.1301(c) of the Commission's rules. Further, we affirm the equal carriage remedy ordered in the Initial Decision, though we decline to order equitable channel placement.

V. ORDERS

108. Accordingly, **IT IS ORDERED**, for the reasons discussed above, that the Application for Review filed by Comcast Cable Communications, LLC **IS DENIED**.

109. **IT IS FURTHER ORDERED**, for the reasons discussed above, that the Exception to the Initial Decision filed by Comcast Cable Communications, LLC with regard to the equitable channel placement remedy ordered by Chief Administrative Law Judge Richard L. Sippel **IS GRANTED** to the extent described herein. All other Exceptions presented by Comcast Cable Communications, LLC **ARE DENIED**.

110. **IT IS FURTHER ORDERED** that the remedy ordered in the Initial Decision of Chief Administrative Law Judge Richard L. Sippel as to channel placement **IS VACATED** and the Initial Decision in all other respects **IS AFFIRMED** to the extent described herein.

(Continued from previous page) _____

suggests. The D.C. Circuit only recently rejected an almost identical argument, noting that concerns about competition remain in the video distribution market due to the hold that cable operators continue to exert over some geographic areas, and stressing that a significant proportion of the top national networks are vertically integrated with the largest cable operators. *Cablevision Sys. Corp.*, 649 F.3d at 712. As Tennis Channel notes, Comcast is the nation's largest distributor, and is almost two and a half times larger than the cable operator (TCI), whose conduct was the focus of Congressional debate leading up to adoption of the 1992 Act. See Tennis Channel Reply at 11 & n.55. It strains credulity to argue that carriage decisions by Comcast that determine access to its 23 million subscribers can under no circumstances unreasonably restrain competition.

³³¹ *Comcast Exceptions* at 37-38. Comcast also argues that its decision to refuse Tennis Channel broader carriage has not hindered Tennis Channel's ability to compete fairly because Tennis Channel can still reach potential viewers through other distributors, through Comcast's Sports Tier, and through the Internet. *Id.* at 36-37. This argument is a simple rephrasing of Comcast's argument that its actions did not unreasonably restrain Tennis Channel's ability to compete, and we reject it for the reasons set forth above. See *supra* ¶ 87.

111. **IT IS FURTHER ORDERED** that pursuant to section 503 of the Communications Act of 1934, as amended, Comcast is **ORDERED TO PAY THE UNITED STATES TREASURY A MONETARY FORFEITURE** in the amount \$375,000.

112. **IT IS FURTHER ORDERED** that Comcast Cable Communications, LLC must provide The Tennis Channel, Inc. with carriage equal to that of its similarly situated affiliates, Golf Channel and Versus (now NBC Sports Network), to the extent described herein.

113. **IT IS FINALLY ORDERED** that Comcast Cable Communications, LLC must complete remediation, as discussed in paragraphs 111 and 112 above, within forty-five (45) days of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**JOINT DISSENTING STATEMENT OF
COMMISSIONERS ROBERT M. MCDOWELL AND AJIT PAI**

Re: *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Memorandum Opinion and Order

Today, the Commission faults Comcast for not having been the first major multichannel video programming distributor (MVPD)³³² to carry Tennis Channel on the same programming tier as Golf Channel and Versus (now NBC Sports Network).³³³ It then takes the extraordinary step of requiring Comcast to give Tennis Channel equal carriage and concomitantly to pay Tennis Channel more for programming rights. Because we do not find sufficient support for the conclusion that Comcast's refusal to carry Tennis Channel on the same tier as Golf Channel and Versus was discriminatorily motivated by different ownership interests, we respectfully dissent.³³⁴

In our view, the Commission's analysis founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream. In 2010, the year in which Tennis Channel filed its complaint, every major MVPD in the United States distributed both Golf Channel and Versus to more subscribers than Tennis Channel. Or, to put it another way, not a single major MVPD found Tennis Channel to be "similarly situated" to Golf Channel and Versus when making carriage decisions. For example, Time Warner distributed Golf Channel to [REDACTED] of its subscribers, Versus to [REDACTED], and Tennis Channel to only [REDACTED]; Cablevision distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) more widely than Tennis Channel ([REDACTED]). On average, major MVPDs unaffiliated with any of these three channels distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) to significantly more subscribers than Tennis Channel ([REDACTED]). Even DIRECTV, which is affiliated with Tennis Channel, distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) more widely than Tennis Channel ([REDACTED]).³³⁵

The Commission attempts to obscure this powerful evidence concerning other MVPDs' carriage practices by comparing apples to oranges. Specifically, it matches statistics on Comcast's carriage of Tennis Channel to those of *all* major MVPDs (other than Comcast), including those with ownership interests in Tennis Channel. This yields a significantly higher penetration rate for Tennis Channel due to the inclusion of DIRECTV and DISH Network—each of which is an affiliated distributor by virtue of an ownership interest. The Commission then concludes that the "record, examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably than they are treated by other MVPDs."³³⁶ This statistical analysis, however, is fatally flawed. When one compares apples to apples—that is, by comparing Comcast's distribution of Tennis Channel to that of other major MVPDs *with no ownership interest in Tennis Channel*—there is no meaningful difference. About [REDACTED] of the other major MVPDs' subscribers received Tennis Channel in 2010, versus

³³² The term "major MVPDs" refers to providers with more than two million subscribers.

³³³ The latter two networks are affiliated with Comcast, while the former is not.

³³⁴ Because we conclude that Comcast did not discriminate against Tennis Channel, we need not reach the broader constitutional and policy arguments raised in this proceeding.

³³⁵ See Comcast Exs. 1102, 1103. DIRECTV and DISH Network are both affiliated with Tennis Channel. See Comcast Exceptions at 15.

³³⁶ Order at ¶ 71.

[REDACTED] of Comcast's subscribers. The Commission ought not implicate the First Amendment interests of a private actor based upon such a miniscule variance in carriage.³³⁷

To be sure, the Commission addresses this point by asserting that there is no evidence that affiliated MVPDs' carriage of Tennis Channel has been influenced by their equity interests in the network. This assertion cannot be squared with the facts. Take the carriage decisions made by major MVPDs in 2010: It was DIRECTV's distribution of Tennis Channel that was clearly an outlier, not Comcast's. Tennis Channel's penetration rate at DIRECTV was an eye-popping [REDACTED] in 2010, almost [REDACTED] the unaffiliated industry average. No other MVPD came close; DIRECTV led the pack by more than [REDACTED] points. Comcast, on the other hand, was in the middle of the pack. As this example suggests, it makes no sense to include major MVPDs with an equity interest in Tennis Channel within the control group if the goal of our analysis is to isolate the effects of ownership on carriage decisions. Rather, the Commission should compare the distribution decisions made by Comcast with the distribution decisions made by MVPDs that do not have an ownership interest in *any* of the networks at issue.³³⁸

Finally, even accepting the Commission's statistical method, it remains the case that MVPDs still distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) *much* more widely than Tennis Channel ([REDACTED]).³³⁹ Therefore, the Commission's statistical analysis, taken on its own terms, does not demonstrate that Comcast's failure to place Golf Channel, Versus, and Tennis Channel on the same tier was primarily the result of discrimination on the basis of affiliation.

The Commission attempts to explain away the large disparity between major MVPDs' distribution of Golf Channel and Versus, on the one hand, and Tennis Channel, on the other, through what it calls the "ripple effect." It describes this phenomenon as follows:

[O]ne MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution. A major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely. An MVPD's decision to narrowly distribute

³³⁷ Assuming, as the Commission asserts, that intermediate scrutiny applies, the Commission must demonstrate that its restriction of First Amendment freedom "is no greater than is essential to the furtherance of [a substantial governmental] interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1996). The Commission's remedy in this case plainly does not meet this test. The Commission identifies the promotion of "fair competition" as the substantial governmental interest at stake here, *see* Order at ¶ 104, but then orders Comcast to treat Tennis Channel more favorably than all other major MVPDs. We fail to see how such a mandate promotes fair competition; rather, it is a requirement for Comcast (and only Comcast: *see* note 10 *infra* and accompanying text) to favor one particular competitor in the marketplace.

³³⁸ The Commission raises the red herring of discrimination with respect to disproportionate carriage of Tennis Channel by DIRECTV and DISH Network, asserting that "the mere fact of vertical integration does not itself establish affiliation-based discrimination by the vertically integrated MVPD in favor of its affiliated network." Order at ¶ 74. But the question is not whether—nor does our position here require us to show that—DIRECTV and DISH Network engaged in discrimination based upon affiliation. (Among other things, we nowhere claim that either provider carried Tennis Channel more broadly than an unaffiliated similarly situated channel or unreasonably restrained any other channel's ability to compete.) The question is merely whether those providers' carriage decisions were likely affected by equity interests, such that they should be excluded from the calculation of major MVPDs' carriage decisions. Common sense compels an affirmative answer to that question, especially given the statistics reviewed above.

³³⁹ *See* Comcast Exs. 1102, 1103.

a network reduces the network's total subscribers, which lowers the licensing revenue it earns, reduces its ability to attract advertisers, and limits its ability to make the investments, such as raising revenue to purchase programming, that are necessary to compete with other sports networks.³⁴⁰

Let us assume for the sake of argument that the ripple effect exists. On this view, had Comcast decided to carry Tennis Channel on the same tier as Golf Channel and Versus, Tennis Channel would have received more advertising revenue and additional subscription fees. These additional revenues, in turn, then could have been used to acquire and produce better programming, and that programming could have made Tennis Channel more attractive to other major MVPDs. Even granting all of this, the ripple effect still is not relevant, much less decisive, with respect to the question presented in this case. If a network such as Tennis Channel is insufficiently attractive for major MVPDs to distribute widely, why is Comcast obligated to be the first mover and provide the network with the revenue and publicity that it needs in order to become attractive to other MVPDs? Comcast's obligation under our rules is to provide unaffiliated networks with non-discriminatory—not preferential—treatment.³⁴¹

Moreover, any waves the ripple effect creates surely are counteracted by the straightforward effect of competition. If consumers demand Tennis Channel as much as the Golf Channel and Versus but Comcast discriminates against it, Comcast's competitors have a golden opportunity to lure Comcast's customers away by distributing Tennis Channel as widely as (if not more widely than) the other two networks. That not a single major MVPD chose this course of action in 2010 is telling—not one company apparently thought that the marketplace demanded Tennis Channel as much as the Golf Channel and Versus.³⁴² Thus, Comcast's carriage of Tennis Channel simply reflected, rather than drove, the industry norm.

³⁴⁰ Order at ¶ 73 (footnotes omitted).

³⁴¹ The Commission's repeated references to Comcast's size or market share do not widen the scope of that obligation. See Order at ¶¶ 9 ("Comcast is the largest MVPD in the United States with approximately 23 million subscribers." (footnotes omitted)); 73 (explaining that the ripple effect is best understood "when viewed in light of Comcast's substantial market share"); 75 (referring to "Comcast's significant market share and the influence it wields in the MVPD market"); 86 (noting that "Comcast is the nation's largest MVPD"); 87 ("Comcast is the nation's largest MVPD. It directly represents nearly 24 percent of the market, and has even greater influence on the market due to the ripple effect." (footnotes omitted)); and n.330 ("Comcast is the nation's largest distributor."). To the extent that the Commission uses Comcast's size as a justification for ordering the company to assist non-affiliated programmers, it strains the legal underpinning of Section 616 of the Communications Act and Section 76.1301(c) of our rules. See 47 U.S.C. § 536; 47 C.F.R. § 76.1301(c). And if the Commission is using market share as a proxy for market power, we are not aware of any preferential-treatment obligation in other areas of competition law, even where (unlike here) market power is acknowledged. For example, traditional antitrust law does not impose an obligation to deal, let alone to offer preferential treatment. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws proscribing monopolization "were enacted for 'the protection of competition, not competitors'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). Nor does a refusal to deal with respect to exclusive, statutorily granted intellectual property rights imply liability. See 35 U.S.C. § 271(d)(4) ("No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his . . . refus[ing] to license or use any rights to the patent."). Even the "essential facilities" doctrine does not go so far as to require affirmative aid, but merely reasonable access. See, e.g., *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp.*, 738 F.2d 1509, 1519 (10th Cir. 1984) (noting that "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it"). *aff'd*, 472 U.S. 585 (1985).

³⁴² The Commission finds it significant that Comcast's most direct competitors, satellite providers, carry Tennis Channel more broadly than Comcast. See Order at n.234. But it is more noteworthy that, notwithstanding the fact that both satellite providers own equity interests in Tennis Channel, neither DIRECTV nor DISH Network did in (continued...)

Perhaps recognizing this problem, the Commission buries a major concession in footnote 290 of its decision. There, the Commission suggests that the reason for its decision isn't Comcast's differential treatment of Tennis Channel and Golf Channel and Versus. The real problem is Comcast's placement of Tennis Channel on the Sports Tier rather than the Digital Preferred Tier. The Digital Preferred Tier is an intermediate tier that would have given Tennis Channel additional subscribers, but not as many as Golf Channel and Versus (which are carried on the widely selected Digital Starter Tier or Expanded Basic Tier).

This concession devastates the Commission's case. Tennis Channel complained that it was being discriminated against vis-à-vis Golf Channel and Versus, two affiliated networks that are broadly carried in the Digital Starter Tier. Therefore, to prevail in this case, Tennis Channel is required to prove that it was unlawful for Comcast to refuse to carry Tennis Channel on the same tier as Golf Channel and Versus. Tennis Channel did *not* complain to the Commission that it was being discriminated against vis-à-vis the affiliated networks that appear on Comcast's Digital Preferred Tier, namely, MLB Network, NBA TV, and NHL Network. Tennis Channel is of course free to file such a complaint and ask for carriage on the Digital Preferred Tier, but that is not the complaint the Commission adjudicates here. The record and the decision below do not compare the programming, distribution, advertising revenue, or other relevant indicators of whether or not Tennis Channel is similarly situated to these Digital Preferred Tier networks. However, the Commission does have a full record regarding the carriage decisions of Comcast and other MVPDs regarding Golf Channel and Versus, and that record demonstrates that Comcast's refusal to place those channels on the same tier as Tennis Channel was in keeping with industry practice.

* * *

Consider, finally, the broader impact of today's decision on consumers. If the Commission merely ordered Comcast to carry Tennis Channel on the same tier as Golf Channel and Versus, that alone would make Comcast an industry outlier. But to add insult to injury, the Commission also effectively obligates Comcast to pay Tennis Channel for this privilege.³⁴³ As a result, in order to shield themselves from discrimination complaints, Comcast and other MVPDs will be more likely to carry networks they do not want, on tiers with broader penetration, and at higher prices than ever before—at least if they are foolish enough to be willing to invest in content creation. And the Commission should not kid itself. These additional programming costs will come out of the pockets of consumers, not from MVPDs' bottom lines.

For all these reasons, we respectfully dissent.

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2010 what the Commission believes that Comcast should have done: distribute Tennis Channel as broadly as Golf Channel and Versus.

³⁴³ The Commission's claim that Comcast could comply with its decision without giving Tennis Channel broader carriage elevates form over substance. See Order at ¶ 90 ("We are also not persuaded by Comcast's argument that it should not have to pay Tennis Channel for broader carriage. As an initial matter, the remedy only requires Comcast to provide Golf Channel and Tennis Channel with equal carriage. Comcast could comply with this remedy without providing Tennis Channel broader carriage."). Comcast theoretically could move Golf Channel and Versus (now NBC Sports) alongside Tennis Channel in the Sports Tier. By doing so, however, Comcast would be distributing Golf Channel and NBC Sports far more narrowly than other MVPDs, to the detriment of Comcast subscribers who presumably value that programming. We very much doubt the Commission believes that this will happen.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Procedures to Govern the Use of Satellite Earth	)	IB Docket No. 02-10
Stations on Board Vessels in the 5925-6425 MHz/)	
3700-4200 MHz Bands and 14.0-14.5 GHz/)	
11.7-12.2 GHz Bands)	

SECOND ORDER ON RECONSIDERATION

Adopted: July 17, 2012

Released: July 19, 2012

By the Commission:

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I. INTRODUCTION

1. In this Second Order on Reconsideration for Earth Stations on Board Vessels (*ESV Second Reconsideration Order*), we adopt changes to the ESV rules in order to promote the deployment of broadband service, to ensure the flexible use of spectrum, and to protect incumbent operators from harmful interference. In particular, we revise our ESV rules by adding technical requirements for variable power ESV systems that use co-frequency transmitters operating simultaneously at varying data rates. ESVs are mobile transmitters that facilitate communications services, including broadband service, to cruise ships, merchant ships, yachts, U.S. Navy vessels, and other maritime vessels that are capable of carrying a stabilized satellite antenna. Our actions in this Order stem from two petitions filed by The Boeing Company (Boeing) and ViaSat, Inc. (ViaSat)¹ requesting changes to our existing ESV rules.² The

¹ See Petition for Reconsideration of The Boeing Company, filed October 15, 2009 (Boeing Petition); Petition for Clarification or Reconsideration of ViaSat, Inc., filed October 15, 2009 (ViaSat Petition). Appendix A contains the complete list of filings.

² See 47 C.F.R. §§ 25.221, 25.222 (ESV rules for operating in the C- and Ku-bands, respectively).

requirements we adopt provide variable power ESV systems with operational flexibility and ensure that incumbent fixed-satellite service (FSS) operators are protected from harmful interference in the C-band³ and Ku-band.⁴

II. BACKGROUND

2. In 2005, the Commission established licensing and service rules for ESVs to operate in the C-band and Ku-band frequencies.⁵ The ESV rules include technical requirements for preventing ESVs from causing harmful interference to other radio services in these bands, including the FSS and Fixed Service (FS). To protect the FSS operators, the Commission adopted off-axis effective isotropically radiated power (EIRP)-density limits⁶ that restrict the power emitted from the ESV antenna towards the satellites adjacent to the target satellite. The Commission also adopted an antenna pointing error requirement that allows ESV antennas to mispoint only within 0.2 degrees when communicating with the target satellite.⁷

3. To protect the FS operators in the C-band, the Commission required ESV operators to coordinate with affected FS operations; placed limits on the amount of spectrum that ESV operators are permitted to coordinate; limited the EIRP towards the radio horizon and the EIRP-density towards the radio horizon; and limited the installation of ESVs to vessels weighing 300 gross tons or more.⁸ The Commission also established rules for licensing ESV systems, including licensing of ESV hub stations and/or blanket licensing for ESV earth stations.⁹ Finally, to protect U.S. satellite and terrestrial licensees from harmful interference, the Commission established requirements for U.S.-registered vessels operating ESVs within and outside of U.S. waters and created a regulatory framework for foreign-registered vessels operating ESVs in U.S. waters.¹⁰

4. In the 2009 Order on Reconsideration (*ESV Reconsideration Order*), the Commission revised certain ESV rules to provide ESV operators with greater flexibility in operating their systems in order to meet the needs of their customers and to be competitive in the global marketplace¹¹ and to

³ The C-band uplink and downlink are allocated to the terrestrial fixed service (FS) and the fixed-satellite service (FSS) on a co-primary basis. The 5925-6425 MHz band also is known as the conventional C-band uplink or 6 GHz band; the 3700-4200 MHz band also is known as the conventional C-band downlink or 4 GHz band. The 5925-6425 MHz band is densely used by the fixed point-to-point microwave service.

⁴ The Ku-band uplink and downlink are allocated to the FSS on a primary basis. The 14.0-14.5 GHz band also is known as the conventional Ku-band uplink or 14 GHz band; the 11.7-12.2 GHz band also is known as the conventional Ku-band downlink or 12 GHz band. ESVs may also operate in a portion of the extended Ku-band (10.95-11.2 GHz and 11.45-11.7 GHz).

⁵ *Procedures to Govern the Use of Satellite Earth Stations on Board Vessels in the 5925-6425 MHz-3700-4200 MHz Bands and 14.0-14.5 GHz-11.7-12.2 GHz Bands*, IB Docket No. 02-10, Report and Order, FCC 04-286, 20 FCC Red 674 (2005) (*ESV Order*). The other services located in the Ku-band include radio astronomy service and space research service. See *ESV Order*, 20 FCC Red at 712-713, 715, ¶¶ 89-90, 96.

⁶ The phrase "off-axis EIRP-density" is used synonymously with "off-axis power-density."

⁷ *ESV Order*, 20 FCC Red at 698-699, 716-717, 718-719, ¶¶ 55-58, 98-101, 103-106.

⁸ *Id.* at 691-695, 700, ¶¶ 39-45, 61-62.

⁹ *Id.* at 722-723, ¶¶ 114-117.

¹⁰ *Id.* at 724-727, ¶¶ 120-128.

¹¹ *Procedures to Govern the Use of Satellite Earth Stations on Board Vessels in the 5925-6425 MHz-3700-4200 MHz Bands and 14.0-14.5 GHz-11.7-12.2 GHz Bands*, IB Docket No. 02-10, Order on Reconsideration, FCC 09-63, 24 FCC Red 10369 (2009) (*ESV Reconsideration Order*).

protect the FSS and FS operators in the C- and Ku-bands. The Commission modified the ESV rules for protecting FSS operators by: (1) allowing ESVs to operate at higher off-axis EIRP-density levels as long as they comply with the certification and cessation of emission requirements specified in that Order;¹² (2) allowing certain ESV systems¹³ to declare their own maximum antenna pointing error and to cease transmissions within 100 milliseconds if they exceed the declared antenna pointing error;¹⁴ and (3) increasing the starting angle of the off-axis EIRP-density envelope to 1.5 degrees.¹⁵ The Commission reasoned that these changes should promote greater operational flexibility for ESVs while continuing to ensure that the FSS will be protected from harmful interference.¹⁶

5. In addition, the Commission clarified the requirements for ESVs to: (1) protect offshore FS operators; and (2) cease transmissions when an FS operator objects to continuation of the ESV operating, in response to a public notice that announces the completed frequency coordination between the ESV operator and FS operators.¹⁷ Further, the Commission revised its decision from the *ESV Order* for ESVs on foreign-registered vessels communicating with foreign-based hubs in the Ku-band. In the *ESV Order*, the Commission allowed those ESVs to operate within 300 kilometers from the U.S. coastline only if: (1) there was a bilateral agreement between the United States and the administration of the foreign-based hub; or (2) the vessels' registering administration had approved the operation of the ESV on the foreign vessel pursuant to ITU¹⁸ Radio Regulation Article 4.4 (ITU RR Art. 4.4).¹⁹ In the *ESV Reconsideration Order*, the Commission reduced the distance in which those conditions apply from 300 kilometers to 150 kilometers from the U.S. coastline.²⁰ Finally, the Commission adopted various procedural changes to

¹² *Id.* at 10373-10376, ¶¶ 10-16.

¹³ Only ESVs with fixed power systems using low power techniques or ESV systems with the ability to control power dynamically may deviate from the 0.2 degree antenna pointing error requirement. *See id.* at 10379-10380, ¶¶ 23-27.

¹⁴ *Id.* at 10379-10380, ¶¶ 23-27.

¹⁵ *Id.* at 10381-10382, ¶¶ 30-31.

¹⁶ *Id.* at 10370, ¶ 1.

¹⁷ *Id.* at 10384-10386, ¶¶ 37-38, 42. In the C-band, ESV operators must coordinate with FS operators. Once the parties complete the coordination, the ESV operator must submit a notification to the Commission that identifies certain details of the completed coordination. Following the receipt of this notification, the Commission releases the public notice announcing the details of the completed coordination, which provides the FS operators 30 days to object on the grounds that they have been excluded from the completed coordination. If an FS operator objects, then the ESV operator must cease transmitting on those frequencies used by that FS operator. *See id.* at ¶¶ 39, 42. *See also International Bureau Provides Guidance Concerning the Notice Requirement for C-Band Coordination by Earth Stations on Vessel*, Public Notice, DA 05-1671 (2005) (outlining the details of the coordination that must be submitted as part of the notification). An ESV system may not commence operation until after the release of the public notice announcing the completed coordination. *ESV Reconsideration Order*, 20 FCC Red at 10385, ¶ 39.

¹⁸ ITU stands for International Telecommunication Union. The ITU is a United Nations agency that "allocate[s] global radio spectrum and satellite orbits, develop[s] the technical standards that ensure networks and technologies seamlessly interconnect, and strive[s] to improve access to [information and communication technologies] to underserved communities worldwide." *See* <http://www.itu.int/en/about/Pages/default.aspx> (last visited July 17, 2012).

¹⁹ *ESV Order*, 20 FCC Red at 726-727, ¶ 128. ITU RR Art. 4.4 allows administrations of Member States to assign frequencies to services that do not conform to the Radio Regulations as long as those services do not cause interference to, or claim protection from interference by, other services licensed in compliance with the Radio Regulations.

²⁰ *ESV Reconsideration Order*, 24 FCC Red at 10395, ¶ 63.

Sections 25.132, 25.221, 25.222 and 25.271 of its rules in order to clarify and facilitate the operation of ESVs as well as the ESV license application process.²¹

6. On October 15, 2009, Boeing filed a Petition for Reconsideration of the *ESV Reconsideration Order* in which it asked the Commission to allow ESVs with multiple co-frequency earth stations transmitting simultaneously using variable power control to operate on an ALSAT²² basis and, in the aggregate, at the same power levels as other FSS operators.²³ On the same day, ViaSat filed a Petition for Clarification or Reconsideration to modify and/or clarify the antenna pointing error requirements.²⁴ The Commission published the public notice of these Petitions in the Federal Register on April 15, 2010.²⁵ On April 29, 2010, Maritime Telecommunications Network, Inc. (MTN) filed a consolidated response to the Petitions filed by Boeing and ViaSat.²⁶

7. Subsequently, in a Public Notice released on January 26, 2011, the International Bureau (Bureau) modified the ESV coordination notification filing procedures by requiring all coordination notifications to be filed electronically via the International Bureau Filing System (IBFS) (<http://licensing.fcc.gov/myibfs/>).²⁷ The Bureau stated that notifications must be filed in the form of a statement referencing the relevant call signs and file numbers.

III. DISCUSSION

8. In this *ESV Second Reconsideration Order*, we grant in part and deny in part the Petition filed by Boeing and deny the Petition filed by ViaSat. In particular, we adopt an aggregate power-density rule that will allow ESVs with variable power, co-frequency systems to operate their individual transmitters simultaneously while using varying off-axis EIRP-density levels instead of requiring each transmitter within the system to use the same EIRP-density. We also require variable power ESV systems to operate 1 dB below the off-axis EIRP-density limits²⁸ in order to protect FSS from harmful interference. In addition, we require ESV applicants seeking a waiver of the 1 dB requirement to file a report regarding their system operations. Further, we require variable power ESV systems to cease transmissions if those ESVs exceed the applicable power-density limits. We decline to clarify the antenna pointing error provisions for ESVs because we find that the current rule provisions effectively explain the requirements for operating an ESV antenna. Finally, we adopt useful, but non-substantive rule changes such as renumbering the rules to incorporate the variable power ESV provisions (in order to

²¹ *Id.* at 10395-10397, ¶ 65.

²² ALSAT authority allows an earth station providing FSS in the Ku-band to access any U.S. satellite or foreign satellite on the Permitted Space Station List as long as its communications are in accordance with the technical parameters and conditions set forth in the earth station's license. See *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, First Reconsideration Order, FCC 99-325, 15 FCC Rcd 7207, 7210-11, ¶ 6, 7215-16, ¶ 19 (1999).

²³ See generally Boeing Petition.

²⁴ See generally ViaSat Petition.

²⁵ See *Petition for Reconsideration of Action in Rulemaking Proceeding*, Federal Register, 75 FR 19401 (2010).

²⁶ Consolidated Response of Maritime Telecommunications Network, Inc., filed April 29, 2010 (MTN Reply).

²⁷ See *The International Bureau Announces a Change in the Procedure for Filing Coordination Notifications for Earth Stations on Vessels Operating in the C-band*, Public Notice, DA 11-132, 26 FCC Rcd 564 (2011). See also Section 25.221(a)(12) in Appendix B.

²⁸ Specifically, 1 dB below the off-axis EIRP-density limits. See 47 C.F.R. §§ 25.221(a)(1)(i), 25.222(a)(1)(i).

be consistent with the rules for Vehicle-Mounted Earth Stations (VMES)) and incorporating the new requirement to file coordination notifications electronically on IBFS. The revisions we adopt today for variable power ESVs will provide greater operational flexibility for those ESVs while continuing to ensure that the FSS operators are protected from harmful interference in the C- and Ku-bands.

A. Off-Axis EIRP-Density Limits and Aggregate Power

9. *Background.* In the *ESV Order*, the Commission adopted off-axis EIRP-density limits to protect the FSS satellite or space station operations from harmful interference in the C- and Ku-bands.²⁹ The off-axis EIRP-density is the power emitted from the ESV antenna in directions other than towards the target satellite. ESV operators may exceed the off-axis EIRP-density limits if they comply with certification and cessation of emission requirements.³⁰

10. The ESV off-axis EIRP-density limits restrict the power-density that is emitted from ESV systems using: (1) a single earth station terminal in a single channel (*i.e.*, single channel per carrier or SCPC system); or (2) a modulation technique such as code division multiple access (CDMA), in which multiple co-frequency earth station terminals transmit simultaneously in the same satellite beam (*i.e.*, aggregate power system). To determine if the off-axis EIRP-density limits are exceeded, the power-density from an SCPC system is measured from the individual terminal, whereas the power-density from an aggregate power system is measured from all of the simultaneously operating co-frequency terminals. The off-axis EIRP-density limits adopted in the *ESV Order* were based on the power-density emitted from an individual terminal in an SCPC ESV system, and did not account for aggregate power systems. Therefore, the Commission, in the *Part 25 Streamlining Sixth Report and Order (Part 25 Streamlining 6th R&O)* incorporated the $10 \cdot \log(N)$ term into the off-axis EIRP-density limits to measure the power-density from individual terminals in aggregate power systems. Specifically, the power-density of each individual co-frequency transmitter is reduced by a factor of $10 \cdot \log(N)$, with “N” representing the maximum number of co-frequency ESV transmitters expected to operate simultaneously in the same satellite receiving beam.³¹ However, the $10 \cdot \log(N)$ term, with “N” defined as set forth above, assumes that aggregate power systems will operate their terminals so that each terminal emits the same level of power-density (*i.e.*, fixed power systems) and does not take into account another type of aggregate power system – a system with terminals that may operate at different levels of power (*i.e.*, variable power or dynamic power systems).

11. In the *VMES Order*, released after the *Part 25 Streamlining 6th R&O*, the Commission adopted licensing and service rules, largely based on the ESV rules, for VMES networks, a land-based mobile application with characteristics similar to ESVs that operates in the FSS-based Ku-band.³² However, in the *VMES Order*, the Commission went a step further than the ESV rules by adopting an

²⁹ See *ESV Order*, 20 FCC Rcd at 698, 716, ¶¶ 55, 99. The off-axis EIRP-density is the power emitted from the ESV antenna in directions other than towards the target satellite. The off-axis EIRP-density limits define the level of power-density that can be emitted from an ESV antenna.

³⁰ See *ESV Reconsideration Order*, 24 FCC Rcd at 10373-10376, ¶¶ 10-16.

³¹ See 2000 Biennial Regulatory Review – *Streamlining and Other Revisions of Part 25 of the Commission’s Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, IB Docket No. 00-248, Sixth Report and Order and Third Further Notice of Proposed Rulemaking, FCC 05-62, 20 FCC Rcd 5593 (2005) (*Part 25 Streamlining 6th R&O*). See also *ESV Order*, 20 FCC Rcd at 698, 716 nn. 154, 256.

³² See *Amendment of Parts 2 and 25 of the Commission’s Rules to Allocate Spectrum and Adopt Service Rules and Procedures to Govern the Use of Vehicle-Mounted Earth Stations in Certain Frequency Bands Allocated to the Fixed-Satellite Service*, IB Docket No. 07-101, Report and Order, FCC 09-64, 24 FCC Rcd 10414 (2009) (*VMES Order*).

aggregate power-density rule for VMES that use variable power systems.³³ In particular, the Commission required VMES applicants using variable power systems to demonstrate that their systems could operate 1 dB below the off-axis EIRP-density limits.³⁴ The Commission also required VMES licensees to file a report one year following the license issuance demonstrating that the system had complied with the power-density requirements.³⁵ However, in the *VMES Order*, the Commission did not provide variable power VMES systems with ALSAT authority and did not define the value of “N” in the $10 \cdot \log(N)$ term for these systems.³⁶

12. In adopting the aggregate power-density rule for VMES systems, the Commission reasoned that individual co-frequency transmitters in variable power networks are capable of operating at different EIRP-density levels in the same satellite receiving beam under control of a central control and monitoring station. The Commission explained that, in a variable power system, the central control and monitoring station dynamically allocates a different EIRP-density to individual transmitters based on the amount of data that needs to be transmitted from a particular transmitter³⁷ with the control paths passing through GSO satellites. Thus, operating variable power VMES systems involves greater operational complexity than systems with fixed power.

13. *Boeing Petition.* In its petition, Boeing requests that the Commission allow CDMA-based ESVs to operate on an ALSAT basis using variable power control and without the 1 dB reduction in power-density required for variable power VMES operators. Boeing claims that the restrictions imposed on variable power ESV systems (requiring that all co-frequency terminals use the same power-density levels) and VMES systems (prohibiting ALSAT licensing and requiring coordination or a 1 dB power-density reduction) “unnecessarily limit the commercial flexibility and broadband throughput of such networks and inhibit their ability to provide broadband services to consumers on ships, trains, trucks and aircraft in the most efficient manner possible.”³⁸

14. In addition, if the Commission declines Boeing’s request, Boeing proposes as an alternative that the Commission modify Section 25.222(a) of the ESV rules to be consistent with Section 25.226(a)(3), which sets forth the requirements for variable power VMES systems.³⁹ Boeing also notes that neither the ESV nor VMES rules define N for CDMA variable power systems.⁴⁰ Thus, Boeing recommends that Section 26.226(a)(3)(i) and the corresponding ESV rule state that “the effective aggregate EIRP-density from all terminals should be at least 1 dB below the off-axis EIRP-density limits defined in (a)(1)(i)(A)-(C), assuming N equals one.”⁴¹

15. ViaSat supports Boeing’s proposal to revise the ESV rules to address variable power systems, including certain CDMA systems.⁴² ViaSat indicates that these constraints – the lack of ALSAT

³³ See *VMES Order*, 24 FCC Red at 10447, ¶ 102.

³⁴ *Id.* at 10447, 10450, ¶¶ 102, 115-117.

³⁵ *Id.* at 10451, ¶ 117.

³⁶ *Id.*

³⁷ *Id.* at 10448, ¶ 110-111.

³⁸ Boeing Petition at 3-4.

³⁹ *Id.* at 8-11.

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² Reply of ViaSat, Inc., filed May 12, 2010 (ViaSat Reply), at 3.

authority and 1 dB power-density reduction – are inconsistent with the National Broadband Plan which recommended the elimination of unnecessary technical restrictions on the use of spectrum.⁴³ ViaSat argues that eliminating the unnecessary restrictions highlighted by Boeing would serve the public interest because: (1) there is no record evidence that variable power systems pose a risk of harmful interference or that such systems are unable to comply with the same power-density levels as other types of earth stations; (2) variable power systems are less likely to cause harmful interference than fixed power systems; (3) the Commission could require such applicants to demonstrate compliance with the applicable power-density limit instead of having a hard, inflexible rule for such systems; and (4) the Commission acknowledges that the restrictions adversely affect the capacity and robustness of these systems.⁴⁴

16. MTN would not object if the Commission modified Section 25.222 to clarify that the value of N is one for variable-power CDMA systems.⁴⁵ However, MTN opposes Boeing's proposal to remove the 1 dB restriction because, in MTN's opinion, the risk of harmful interference should be assessed on a case by case basis and, if the requirements for exceeding the off-axis EIRP-density limits in Section 25.226(a)(3)(ii) is applied to ESVs, then ESVs would be able to exceed the off-axis EIRP-density levels in Section 25.226(a)(3)(i).⁴⁶

17. *Discussion.* We grant, in part, Boeing's alternative request to adopt an aggregate power-density rule for variable power ESV systems, similar to what we did for VMES in Section 25.226(a)(3)(i). However, as explained below, we decline to grant Boeing's proposal to adopt the requirements for exceeding the off-axis EIRP-density limits and the reporting requirements set forth in Sections 25.226(a)(3)(ii) and 25.226(a)(3)(iii), respectively, of the VMES rules. As part of the aggregate power-density rule, we require variable power ESVs to operate at least 1 dB below the off-axis EIRP-density limits. A reduction in power of 1 dB means that the maximum power-density permitted would be equivalent to 80 percent of the power emitted by other ESV systems. We also grant Boeing's request to give variable power ESV systems ALSAT authority and, as Boeing proposes,⁴⁷ we define, for $10 \cdot \log(N)$, N equal to one for aggregate variable power-density, co-frequency systems. We decline Boeing's proposal to remove the requirement for variable power ESV systems to operate terminals at least 1 dB below the off-axis EIRP-density limits on an aggregate basis. As explained below, ESV applicants have the option to pursue a waiver of the 1 dB requirement. We will require ESV applicants intending to seek a waiver of the 1 dB requirement to file a report detailing the operations of the system along with their request. Finally, we adopt a cessation of emission rule for variable power systems. The changes we implement today should provide greater operational flexibility for variable power ESV systems while ensuring that the FSS satellite or space station operations are protected from harmful interference. These changes also provide variable power ESV systems regulatory parity with variable power VMES systems.

18. The aggregate power-density rule allows variable power ESV systems to operate with greater flexibility. We recognize that the current off-axis EIRP density limits allow the operation of ESV systems that utilize multiple, co-frequency transmitters operating simultaneously, which are some of the characteristics of variable power systems. However, the current limits require each of those transmitters to operate at the same level of power-density, pursuant to $10 \cdot \log(N)$, and do not take into account the dynamic component of the variable power system. The variable power system's dynamic component

⁴³ *Id.*

⁴⁴ *Id.* at 4-5.

⁴⁵ MTN Reply at 2-3.

⁴⁶ *Id.* at 3.

⁴⁷ Boeing Petition at 10.

allocates different levels of power-density to different terminals, depending on the data needs in the areas covered by each of those terminals. The aggregate power-density rule that we adopt today recognizes and promotes the dynamic component of the variable power ESV system, thereby creating greater operational flexibility for those systems.

19. As noted above, we decline to grant Boeing's proposal to eliminate the 1 dB restriction, a requirement for variable power VMES operators. Although operating 1 dB below the EIRP-density envelope will result in a reduction of capacity, we disagree with Boeing and ViaSat that the 1 dB power-density reduction is unnecessary for this type of system. As we explained in the *VMES Order*, a dynamic or variable power system is complex – the system's network control and monitoring center must manage a large number of factors and, as a result of operating commands through FSS satellites, there are inherent time delays in relaying commands and monitoring the co-frequency terminals.⁴⁸ This complexity, combined with the fact that these are mobile applications operating in a fixed satellite frequency band, necessitates adoption of more cautionary measures, such as requiring the ESV system to reduce power-density by 1 dB. Moreover, because variable power ESV systems have technology that is similar to VMES variable power systems, we are not compelled to eliminate the 1 dB requirement for ESV systems.

20. However, we agree with Boeing and ViaSat that certain variable power ESV systems may be capable of operating without the 1 dB requirement while preventing interference and, therefore, these systems may regain the 20 percent system capacity that is lost due to the 1 dB reduction. As Boeing states, variable power networks have operated in the United States on an experimental basis for several years without complaints of harmful interference.⁴⁹ Further, MTN asserts that the potential for harmful interference from these systems should be assessed on a case-by-case basis and we agree.⁵⁰ We conclude, therefore, that the waiver process described in detail below is an appropriate approach to permit qualified variable power ESV systems to operate without the 1 dB requirement.⁵¹

21. Pursuant to Section 1.3 of the Commission's rules, the ESV operator may file a request to waive the 1 dB requirement. We require the waiver request to be accompanied by a report⁵² that demonstrates that the system has operated without providing unacceptable interference to adjacent satellites.⁵³ In order to help ensure that the report includes sufficient technical information, we encourage the ESV applicant to refrain from filing a waiver request until its system is operating at or

⁴⁸ See *VMES Order*, 24 FCC Red at 10450, ¶ 115.

⁴⁹ Boeing Petition at 4.

⁵⁰ MTN Reply at 3.

⁵¹ We highlight the waiver as an option here in order to emphasize that ESV operators do not need to request a change to the aggregate power rule in order to operate without the 1 dB restriction.

⁵² At a minimum, the report should evaluate, through the use of operational statistics, actual measurements or a combination thereof, the aggregate power-density at the geostationary satellite orbit (GSO) from all simultaneously active co-frequency transmitters. The report should include information on the average and maximum number of simultaneous co-frequency transmitters, an analysis of the EIRP-spectral density at the GSO, and a discussion of the factors taken into account at the network control center required to manage the aggregate power-density of the system.

⁵³ We note that, in the *VMES Order*, the Commission required variable power systems to file a report one year following approval for the VMES license detailing that the system has met the power-density requirements. See *VMES Order*, 24 FCC Red at 10451, ¶ 117. We do not adopt that requirement here. Instead, we require a report only for those applicants seeking a waiver of the 1 dB requirement.

above 50 percent of its capacity.⁵⁴ This report will provide us with the data we need to make a determination on the waiver request. We will place the waiver request and report on public notice seeking comment from the FSS satellite operators and other interested parties. As a result, variable power ESVs may demonstrate through the waiver process, as explained above, that they are capable of operating at the same power-density level as other ESV systems without causing harmful interference to the FSS.

22. We also adopt a cessation of emission requirement for variable power ESV systems that differs depending upon whether one of two scenarios occurs. Under the first scenario, if the power-density from an individual transmitter exceeds the applicable⁵⁵ power-density limit, then that transmitter must cease or reduce emissions automatically within 100 milliseconds of detecting this violation. Under this scenario, the individual transmitter must be self-monitoring and capable of shutting itself off. Under the second scenario, if the power-density of one or more transmitters causes the aggregate off-axis EIRP-densities to exceed the applicable power-density limit, then the transmitter or transmitters must cease or reduce emissions within 100 milliseconds of receiving the appropriate command from the system's central control and monitoring station. As part of the application, the ESV operator should describe how the system will respond when the power-density in excess of the applicable off-axis EIRP-density limits is detected. Finally, this cessation of emission requirement also applies to variable power ESV systems operating at higher power levels under Sections 25.221(a)(2) and 25.222(a)(2), except that that variable power system must cease emissions when it exceeds the power levels provided to the target satellite operator.⁵⁶

23. Boeing observes that the Commission did not explain in either the *ESV Reconsideration Order* or the *VMES Order* why it adopted operating requirements for variable power systems in the VMES rules but not in the ESV rules.⁵⁷ We did not discuss variable power ESV systems in the above-referenced Orders because Boeing, which had raised that issue, withdrew it from the record of the ESV docket prior to the release of these orders.⁵⁸ However, Boeing has raised the issue in its current Petition, so we address it here. We agree with Boeing that ESV systems are technically identical to VMES systems in relevant respects, and that there is no reason to treat ESV variable power systems any

⁵⁴ We note that the 1 dB reduction in EIRP-density is equivalent in a capacity reduction of about 20% over operations at the maximum permitted EIRP-density. If the system is designed to operate at the maximum EIRP-density, then notifying the Commission when it has reached 50% of peak capacity allows for a further 30% growth during the year following notification without exceeding the minus 1 dB limit. Further, we note that to show that the system will not cause harmful interference while operating at full power, the report should demonstrate a correspondence between the current capacity and the current aggregate EIRP-density at the GSO.

⁵⁵ By "applicable," we mean that, for variable power ESV systems that do not request, or request, but do not obtain a waiver of the 1 dB requirement, the applicable power-density limits would be the off-axis EIRP-density limits minus 1 dB. For variable power ESV systems that obtain Commission approval to waive the 1 dB requirement, the applicable power-density limit would be the off-axis EIRP-density limit set forth in Sections 25.221(a)(1)(i), 25.222(a)(1)(i).

⁵⁶ See Sections 25.221(a)(2)(iii), 25.221(b)(2)(iv), 25.222(a)(2)(iii) and 25.222(b)(2)(iv) in Appendix B.

⁵⁷ Boeing Petition at 9.

⁵⁸ We note that Boeing raised this issue in the context of its petition for reconsideration of the *ESV Order* but later submitted a letter withdrawing its petition in part. Because the Commission at that time considered the partial withdrawal to cover operational requirements for variable power ESV systems, it did not address this matter. See *ESV Reconsideration Order*, 24 FCC Red at 10370 n.4, citing Letter from Carlos M. Nakla, Counsel for Boeing, to Marlene H. Dortch, Secretary, FCC (dated Mar. 23, 2007). As Boeing did not intend to withdraw its petition in this regard, we agree that the matter should be considered pending, and, consequently, we resolve it here.

differently than variable power VMES systems. Accordingly, we adopt rules that permit the variable power ESV systems to operate as described above.

24. We disagree, however, with Boeing's claim that, in the *ESV Reconsideration Order*, the Commission changed the off-axis EIRP-density limits by specifically removing a reference to variable power CDMA networks.⁵⁹ The Commission modified the definition of the term "N" in three ways, none of which had the effect of changing the off-axis EIRP density limits: (1) the term "CDMA" was dropped to make the rule clearer for those systems that may employ alternative ways of operating simultaneous co-frequency transmitters than by "code-division multiple access;" (2) the term "maximum" was replaced by "expected maximum" to better describe what was expected in the application; and (3) the phrase "that have the same EIRP" was added to better describe the mathematical expression " $10 \cdot \log(N)$ " in the rule.

25. Finally, as noted above, we decline Boeing's proposal that we adopt the requirements for exceeding the off-axis EIRP-density limits and the reporting requirement set forth in Section 25.226(a)(3)(ii) and 25.226(a)(3)(iii), respectively, of the VMES rules.⁶⁰ We find that incorporating the requirements exceeding the off-axis EIRP-density limits into Sections 25.221(a)(3) and 25.222(a)(3) is redundant with those same requirements set forth in Sections 25.221(a)(2) and 25.222(a)(2) of the ESV rules. We also find that the reporting requirement, which requires variable power VMES systems to file a report one year following license issuance that details the aggregate EIRP-density levels as a result of operations, is unnecessary, especially since variable power systems must operate 1 dB below the off-axis EIRP-density limits. As explained above in the discussion of the waiver process, we find that filing a report regarding system operations should only be required for variable power ESV operators requesting a waiver of the 1 dB requirement.⁶¹

B. Antenna Pointing Error Requirement

26. *Background.* In the *ESV Order*, the Commission adopted an antenna pointing error requirement in order to protect adjacent satellites from harmful interference.⁶² Specifically, the Commission required each ESV operator to maintain an antenna pointing error within 0.2 degrees between the target satellite and the axis of the ESV antenna's main lobe.⁶³ The Commission also required the ESV system to cease emissions automatically within 100 milliseconds if the antenna pointing error exceeded 0.5 degrees.⁶⁴

27. In the *ESV Reconsideration Order*, however, the Commission relaxed the antenna pointing error requirement in order to allow more operational flexibility for certain ESV systems described below.⁶⁵ The Commission recognized that certain ESV operators may be capable of maintaining a pointing error that is greater than 0.2 degrees without exceeding the off-axis EIRP-density limits that protect FSS satellites adjacent to the target satellite.⁶⁶ Thus, ESVs that operate with a constant level of power could lower the earth station EIRP-density and could deviate from the antenna pointing error

⁵⁹ Boeing Petition at 5.

⁶⁰ See *id.* at 9-10.

⁶¹ See *supra*, ¶ 21.

⁶² *ESV Order*, 20 FCC Rcd at 699, ¶ 58.

⁶³ 47 C.F.R. §§ 25.221(a)(1)(ii)(A), 25.222(a)(1)(ii)(A).

⁶⁴ *Id.* §§ 25.221(a)(1)(iii)(A), 25.222(a)(1)(iii)(A).

⁶⁵ *ESV Reconsideration Order*, 24 FCC Rcd at 10379-10380, ¶¶ 23-27.

⁶⁶ *Id.* at 10379, ¶ 24.

requirement if they declare a maximum antenna pointing error that exceeded 0.2 degrees.⁶⁷ In addition, ESV operators capable of controlling power dynamically⁶⁸ may exceed the antenna pointing error requirement if those operators simultaneously reduce their power by a proportionate amount.⁶⁹

28. *ViaSat Petition.* ViaSat requests that the Commission modify and/or clarify four areas of the antenna pointing error rules in order to provide the certainty needed to ensure further development of ESV services and technologies.⁷⁰ First, ViaSat proposes that the Commission add the term “peak” to the 0.2 antenna pointing error requirement in Section 25.222(a)(1)(ii)(A).⁷¹ ViaSat argues that the Commission intended for the 0.2 degree pointing error to be a “peak” level and not a “maximum” limit. In particular, according to ViaSat, the Commission expressed its intent to be consistent with ITU Resolution 902’s (Res. 902) technical parameters, “which requires operators to maintain a pointing accuracy within 0.2 degrees peak.”⁷² According to ViaSat, the term “peak” in this context is generally understood to be the value three standard deviations above the mean value in a normal distribution.⁷³ ViaSat further asserts that, unlike the antenna pointing error, the higher 0.5 degree shut-down limit could be described as a maximum limit.⁷⁴ ViaSat also argues that the new language in Section 25.222(a)(1)(ii)(B) allowing ESV operators to declare a “maximum” antenna pointing error implies that the 0.2 degree antenna pointing error is a maximum limit instead of a peak level. ViaSat therefore requests that the Commission modify that rule to remove such an implication.⁷⁵

29. Second, ViaSat argues, for the reasons discussed above, that applicants declaring their own antenna pointing error should provide both a “peak” pointing tolerance and the “maximum” mispointing levels. Specifically, ViaSat requests that the Commission modify Section 25.222(a)(1)(ii)(B) so that applicants declare a “peak,” instead of a “maximum” antenna pointing error that may be greater than 0.2 degrees.⁷⁶ ViaSat also requests that the Commission: (1) modify Section 25.222(a)(1)(iii)(B) to allow applicants to specify a “maximum” mispointing limit in excess of 0.5 degrees as long as they comply with the applicable off-axis EIRP-density limits; and (2) require the applicants to shut down when they exceed that “maximum” mispointing limit.⁷⁷

30. Third, ViaSat requests that the Commission clarify that the antenna pointing error includes both non-deliberate and deliberate mispointing. ViaSat argues that, in the *ESV Reconsideration Order*,

⁶⁷ *Id.* at 10379-10380, ¶¶ 23-25.

⁶⁸ Controlling power dynamically means that the ESV system may automatically increase or decrease power depending on the pointing of the antenna.

⁶⁹ *ESV Reconsideration Order*, 24 FCC Red at 10380, ¶ 27.

⁷⁰ ViaSat Petition at 2.

⁷¹ See ViaSat Petition, Exh. A, Proposed Revisions to New Rules.

⁷² See ViaSat Petition at 2-3. Res. 902, entitled “Provisions relating to earth stations located on board vessels which operate in fixed-satellite service networks in the uplink bands 5925-6425 MHz and 14-14.5 GHz,” was adopted at the 2003 World Radio Conference (WRC-03) and contains the international technical provisions related to ESV operations.

⁷³ ViaSat Petition at 3.

⁷⁴ *Id.*

⁷⁵ *Id.* at 3-4.

⁷⁶ *Id.* at 5.

⁷⁷ *Id.*

the Commission only identified non-deliberate causes of antenna mispointing, thereby creating an uncertainty as to whether deliberate antenna mispointing would be allowed. ViaSat claims that many ESV terminals use closed-loop tracking systems that deliberately mispoint the antenna in order to determine whether the signal strength from the target satellite can be enhanced.⁷⁸ ViaSat reasons that making this clarification would provide the Commission, the satellite industry and the public with more comprehensive information when evaluating ESV applications.⁷⁹

31. Finally, ViaSat requests that the Commission clarify that ESV operators may simultaneously deviate from the antenna pointing error requirement (which, according to ViaSat, should be 0.2 degrees peak and 0.5 degrees maximum) *and* the off-axis EIRP-density limits provided that those technical parameters have been coordinated with satellites adjacent to the target satellite.⁸⁰ According to ViaSat, Section 25.222(a)(2) of the ESV rules allows ESV operators to exceed the off-axis EIRP-density limits, but Sections 25.222(a)(1)(ii)(B) and 25.222(a)(1)(iii)(B) require ESV operators to stay within the mask if the ESVs declare their own pointing error.⁸¹ ViaSat argues that making this clarification would be consistent with the intent of the *ESV Reconsideration Order*, which is to maximize operator flexibility to the extent that such flexibility does not cause harmful interference to adjacent satellite operators.⁸²

32. Boeing supports ViaSat's proposals, but without explanation.⁸³ MTN does not oppose ViaSat's proposals, but is not convinced that the changes proposed by ViaSat are needed.⁸⁴ MTN also expresses concern that adoption of ViaSat's proposals, without careful implementation, could lead to confusion, an outcome that MTN does not support.⁸⁵ Boeing also "agrees with MTN that the Commission should carefully implement the proposals so that no further confusion is caused."⁸⁶

33. *Discussion.* First, we decline to specify that the 0.2 degree antenna pointing error is a "peak" limit in the 0.2 antenna pointing error rule, as requested by ViaSat. We disagree with ViaSat that the term "peak"⁸⁷ in this context is understood to be the value three standard deviations above the mean value in a normal distribution.⁸⁸ The term "peak" also has other meanings such as "[t]he highest value attained by a varying quantity" and "the most extreme possible amount or value."⁸⁹ Further, the ITU did not associate any particular definition with the term "peak" as it was used in Res. 902.⁹⁰ By not using the term "peak" and by specifying a shut-off angle in the ESV rules, the Commission provided ESV

⁷⁸ *Id.*

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 6-8; ViaSat Reply at 1-2.

⁸¹ ViaSat Petition at 7.

⁸² *Id.* at 8.

⁸³ *Id.*

⁸⁴ MTN Reply at 4.

⁸⁵ *Id.*

⁸⁶ Reply of The Boeing Company, filed May 12, 2010 (Boeing Reply), at 8-9.

⁸⁷ We note that ViaSat does not provide a source for its "common" definition of the term "peak."

⁸⁸ Thus, ViaSat contends, the Commission did not intend the 0.2 degree level to be a maximum, but rather understood that this level would be exceeded only on rare occasions. ViaSat Petition at 3.

⁸⁹ See <http://www.thefreedictionary.com/peak> (last visited July 17, 2012).

⁹⁰ See ITU Resolution 902 Annex 2.

manufacturers with greater operational flexibility, thereby promoting competition in the maritime broadband marketplace while continuing to ensure that FSS systems would receive no harmful interference. Further, we decline to define the 0.5 degree shutoff angle as a maximum limit. The rule clearly sets forth 0.5 degrees as a shutoff angle for ESV antennas, thereby providing sufficient guidance for when ESV antennas need to cease transmitting.

34. We also decline to modify Section 25.222(a)(1)(ii)(B) (self-declared maximum antenna pointing error rule) in response to ViaSat's assertion that the rule implies that the 0.2 degree antenna pointing error is a maximum limit. The self-declared maximum antenna pointing error rule provides that ESV operators "shall declare a maximum antenna pointing error that may be greater than 0.2 degrees."⁹¹ The Commission referenced the 0.2-degree antenna pointing error in the rule in order to emphasize that declaring a maximum pointing error is an alternative way to comply with ESV antenna pointing requirements. In addition, the Commission did not intend for the self-declared maximum antenna pointing error rule to replicate the 0.2-degree antenna pointing error rule. In the self-declared maximum antenna pointing error rule, the Commission sought to ensure that applicants identified the maximum pointing angle that could be achieved without causing harmful interference and were capable of ceasing emissions if that antenna pointing error were exceeded. The rule, as written, provides ESV operators the flexibility to innovate and develop new approaches to provide services and to protect incumbents, thereby advancing market-driven deployment of broadband services while continuing to ensure that ESV operators protect FSS providers from harmful interference.

35. Second, we decline to require ESV applicants operating under the self-declared maximum antenna pointing error rule to specify both "peak" and "maximum" mispointing levels. As noted above, specifying a "peak" mispointing angle makes it necessary to define the term "peak." By not specifying "peak" mispointing levels, we permit the system designer maximum flexibility. In addition, the Commission intended for the self-declared maximum mispointing angle and the cessation of emission (or shut-off angle) to be the same because it allows an ESV operator to determine its own peak, be it three standard deviations from the mean of a normal distribution as ViaSat contends, or some other definition. More importantly, having these angles be the same ensures that the ESV system ceases transmissions when the system's power levels exceed the off-axis EIRP-density envelope and that we know at what angle this occurs so that we can verify the designer's calculations. Thus, specifying a peak angle would be an unnecessary requirement and could restrict the ESV operator's design of its system.

36. Moreover, we agree with MTN that the changes, as proposed by ViaSat, are unnecessary.⁹² These rules have been in effect since 2005 and a number of ESV licenses have been granted. There is no evidence that ESV operators have experienced any difficulty interpreting and applying the antenna pointing error provisions in the ESV rules. We also find that applying new definitions such as "peak" and "maximum" to these angular limits, as proposed by ViaSat, could have the inadvertent effect of creating confusion, a result that could undermine the flexibility intended in the rules and hamper the implementation of ESV systems.

37. Third, we do agree, however, with ViaSat's assertion that the antenna pointing error rule includes both intentional and unintentional antenna mispointing. But contrary to ViaSat's contention, we do not agree that a clarification is necessary. There is nothing in the *ESV Reconsideration Order* to indicate that the list of mispointing examples, which are examples of unintentional mispointing, is all-inclusive. As MTN correctly states, the antenna pointing error rule is understood to include both

⁹¹ 47 C.F.R. § 25.222(a)(1)(ii)(B).

⁹² See MTN Reply at 3-4.

deliberate and non-deliberate pointing.”⁹³

38. Finally, we acknowledge that ESV operators may deviate from both the antenna pointing error and off-axis EIRP-density limits, as provided in Section 25.222(a)(2), once those parameters have been coordinated with the adjacent satellites. However, once again, we disagree with ViaSat that a clarification is necessary. Section 25.222(a) states, in part, that “ESV licensees must comply with the requirements in *either* paragraph (a)(1) or (a)(2) of this section.”⁹⁴ Section 25.222(a)(2) makes no mention of any constraints on antenna mispointing angles. So, if ESVs operate pursuant to the off-axis EIRP-density limits under paragraph (a)(1), then those operators must remain within those limits when deviating from the antenna pointing error requirement. If ESVs operate at higher off-axis EIRP-density levels, as allowed under paragraph (a)(2), then it follows that those operators may deviate from the antenna pointing error requirement as long as they remain within the agreed-upon higher power levels. Thus, we conclude that it is clear that ESV operations under Section 25.222(a)(2) have no specific limitations on antenna mispointing angles provided that the ESV system technical parameters have been coordinated with satellites adjacent to the target satellite.

C. Procedural Rule Revisions

39. Finally, we adopt procedural rule changes set forth in Appendix B of this Order.⁹⁵ First, we place the variable power provisions adopted today in paragraphs (a)(3) and (b)(3) of Sections 25.221 and 25.222 in order to be consistent with the VMES rules, which also have variable power provisions in paragraphs (a)(3) and (b)(3) of Section 25.226.⁹⁶ As a result, the subsequent paragraphs are renumbered. For example, the point of contact requirement set forth in paragraph (a)(3) of Section 25.221 can now be found in paragraph (a)(4) and so on. We also modify the newly renumbered Section 25.221(a)(12),⁹⁷ which sets forth the coordination requirements, by incorporating the requirement to file coordination notifications electronically via IBFS.⁹⁸

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Certification

40. The Regulatory Flexibility Act of 1980, as amended (RFA),⁹⁹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁰⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁰¹

⁹³ See *id.* at 4 n.9.

⁹⁴ 47 C.F.R. § 25.222(a) (emphasis added).

⁹⁵ These rule changes are not subject to the notice and comment requirements of the Administrative Procedure Act. See 5 U.S.C. § 553(b)(3)(A) (2007). All rule changes described in this section are “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” *Id.*

⁹⁶ See 47 C.F.R. §§ 25.226(a)(3), 25.226(b)(3).

⁹⁷ Prior to this change, the coordination requirements could be found in Section 25.221(a)(11).

⁹⁸ See *infra*, ¶ 7.

⁹⁹ The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁰⁰ 5 U.S.C. § 605(b).

¹⁰¹ 5 U.S.C. § 601(6).

In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁰² A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA).¹⁰³

41. In light of the rules adopted in the *ESV Order*, we find that there are only two categories of licensees that would be affected by the new rules. These categories of licensees are Satellite Telecommunications and Fixed-Satellite Transmit/Receive Earth Stations. The SBA has determined that the small business size standard for Satellite Telecommunications is a business that has \$15 million or less in average annual receipts.¹⁰⁴ Currently there are approximately 3,390 operational fixed-satellite transmit/receive earth stations authorized for use in the C- and Ku-bands. The Commission does not request or collect annual revenue information, and thus is unable to estimate the number of earth stations that would constitute a small business under the SBA definition. Of the two classifications of licensees, we estimate that only 15 entities will provide ESV service. For the reasons described below, we certify that the policies and rules adopted in this *Second Reconsideration Order* will not have a significant economic impact on a substantial number of small entities.

42. In the *ESV Order*, the Commission established licensing and service rules for ESVs operating in the 5925-6425 MHz/3700-4200 MHz (C-band) and 14.0-14.5 GHz/11.7-12.2 GHz (Ku-band) frequencies. These rules allow ESV operations in the C- and Ku-bands, while ensuring that ESVs protect the fixed service (FS) and fixed-satellite service (FSS) operators, and a limited number of Government operations in these bands from harmful interference. In the *Order on Reconsideration*, the Commission clarified and modified certain ESV rules designed to protect the FSS and the FS in the C- and Ku-bands in order to allow greater operational flexibility for ESVs. For example, ESVs may operate at higher off-axis power-density levels as long as the ESV remains within the parameters of the coordination agreements between the target satellite and adjacent satellites. In this *Second Reconsideration Order*, we further promote operational flexibility while ensuring that the FSS operators are protected from harmful interference by adopting an aggregate power-density rule and a cessation of emission rule for variable power ESV systems.

43. The Commission does not expect a substantial number of small entities to be directly impacted by the rule changes adopted in this *Second Reconsideration Order*. Specifically, we expect that fewer than ten entities will be affected by the variable power rule provisions adopted in this Order. In addition, we believe these new rule provisions will not impose a significant economic impact on small entities and, in fact, will benefit both large and small entities utilizing variable power systems by allowing greater operational flexibility in providing ESV service. Therefore, we certify that the requirements adopted in this *Second Reconsideration Order* will not have a significant economic impact on a substantial number of small entities.

B. Final Paperwork Reduction Act of 1995 Analysis

44. This document does not contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain

¹⁰² 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁰³ 15 U.S.C. § 632.

¹⁰⁴ 13 C.F.R. § 121.201, NAICS codes 517410.

any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

V. ORDERING CLAUSES

45. IT IS ORDERED that, pursuant to Sections 4(i), 7, 302, 303(c), 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157, 302, 303(c), 303(e), 303(f) and 303(r), this Second Order on Reconsideration IS ADOPTED. Part 25 of the Commission's Rules IS AMENDED, as specified in Appendix B, effective 30 days after publication in the Federal Register.

46. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by The Boeing Company IS GRANTED in part to the extent described above and IS DENIED in all other respects.

47. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by ViaSat, Inc. IS DENIED.

48. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Certification, as required by Section 604 of the Regulatory Flexibility Act, IS ADOPTED.

49. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Order on Reconsideration including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Parties

List of Petitioners

The Boeing Company (Boeing)
ViaSat, Inc. (ViaSat)

List of Replies

Boeing
Maritime Telecommunications Network, Inc. (MTN)
ViaSat

Ex Parte Filings

Boeing

APPENDIX B**Rule Revisions**

For the reasons discussed above, the Federal Communications Commission amends 47 C.F.R. part 25 as follows:

PART 25 – SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 continues to read as follows:

Authority: 47 U.S.C. 701-744. Interprets or applies Sections 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 332, unless otherwise noted.

2. Amend Section 25.221 as follows:

- a. Revise paragraph (a) introductory text;
- b. Revise the first sentence of paragraph (a)(1)(ii) and paragraph (a)(1)(iii);
- c. Revise paragraph (a)(2);
- d. Revise paragraph (a)(2)(iii);
- e. Redesignate paragraphs (a)(3) through (a)(12) as paragraphs (a)(4) through (a)(13);
- f. Add new paragraph (a)(3);
- g. Revise paragraph (b) introductory text;
- h. Revise paragraph (b)(2);
- i. Revise paragraph (b)(2)(iv);
- j. Redesignate paragraphs (b)(3) through (b)(5) as paragraphs (b)(4) through (b)(6);
- k. Add new paragraphs (b)(3) and (b)(7).

§ 25.221 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 3700–4200 MHz (space-to-Earth) frequency band and transmitting in the 5925–6425 MHz (Earth-to-space) frequency band, operating with Geostationary Satellite Orbit (GSO) Satellites in the Fixed-Satellite Service.

(a) The following ongoing requirements govern all ESV licensees and operations in the 3700–4200 MHz (space-to-Earth) and 5925–6425 MHz (Earth-to-space) bands transmitting to GSO satellites in the fixed-satellite service. ESV licensees must comply with the requirements in paragraph (a)(1), (a)(2) or (a)(3) of this section and all of the requirements set forth in paragraphs (a)(4)–(a)(13) of this section. Paragraph (b) of this section identifies items that must be included in the application for ESV operations to demonstrate that these ongoing requirements will be met.

(1) * * *

(ii) Except for ESV systems operating under paragraph (a)(3), each ESV transmitter must meet one of the following antenna pointing error requirements:

(A) * * *

(B) * * *

(iii) Except for ESV systems operating under paragraph (a)(3), each ESV transmitter

must meet one of the following cessation of emission requirements:

(A) * * *

(B) * * *

(2) The following requirements shall apply to an ESV that uses off-axis EIRP spectral-densities in excess of the levels in paragraph (a)(1)(i) or (a)(3)(i) of this Section. An ESV or ESV system operating under this subsection shall file certifications and provide a detailed demonstration(s) as described in paragraph (b)(2) of this section.

(i) * * *

(ii) * * *

(iii) The ESV shall operate in accordance with the off-axis EIRP spectral-densities that the ESV supplied to the target satellite operator in order to obtain the certifications listed in paragraph (b)(2) of this section. Except for ESVs with variable power systems, the ESV shall automatically cease emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator. For ESVs using variable power systems, the individual ESV transmitter shall automatically cease or reduce emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limits supplied to the target satellite operator; the individual transmitter must be self-monitoring and capable of shutting itself off; and if one or more ESV transmitters causes the aggregate off-axis EIRP-densities to exceed the off-axis EIRP-density limits supplied to the target satellite operator, then the transmitter or transmitters shall cease or reduce emissions within 100 milliseconds of receiving a command from the system's central control and monitoring station.

(3) The following requirements shall apply to an ESV system that uses variable power-density control of individual simultaneously transmitting co-frequency ESV earth stations in the same satellite receiving beam unless that ESV system operates pursuant to paragraph (a)(2). An ESV system operating under this subsection shall provide a detailed demonstration as described in paragraph (b)(3) of this section.

(i) The effective aggregate EIRP-density from all terminals shall be at least 1 dB below the off-axis EIRP-density limits defined in paragraph (a)(1)(i), with the value of $N=1$. In this context the term "effective" means that the resultant co-polarized and cross-polarized EIRP-density experienced by any GSO or non-GSO satellite shall not exceed that produced by a single transmitter operating 1 dB below the off-axis EIRP-density limits defined in paragraph (a)(1)(i). An ESV system operating under this subsection shall provide a detailed demonstration as described in paragraph (b)(3)(i) of this section.

(ii) The individual ESV transmitter shall automatically cease or reduce emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limits specified in paragraph (a)(3)(i). The individual transmitter must be self-monitoring and capable of shutting itself off. If one or more ESV transmitters causes the aggregate off-axis EIRP-densities to exceed the off-axis EIRP-density limits specified in paragraph (a)(3)(i), then the transmitter or transmitters shall cease or reduce emissions within 100 milliseconds of receiving a command from the system's central control and monitoring station.

(4) There shall be a point of contact in the United States, with phone number and address, available 24 hours a day, seven days a week, with authority and ability to cease all emissions

from the ESVs, either directly or through the facilities of a U.S. Hub or a Hub located in another country with which the United States has a bilateral agreement that enables such cessation of emissions.

(5) For each ESV transmitter, a record of the ship location (*i.e.*, latitude/longitude), transmit frequency, channel bandwidth and satellite used shall be time annotated and maintained for a period of not less than 1 year. Records will be recorded at time intervals no greater than every 20 minutes while the ESV is transmitting. The ESV operator will make this data available upon request to a coordinator, fixed system operator, fixed-satellite system operator, or the Commission within 24 hours of the request.

(6) ESV operators communicating with vessels of foreign registry must maintain detailed information on each vessel's country of registry and a point of contact for the relevant administration responsible for licensing ESVs.

(7) ESV operators shall control all ESVs by a hub earth station located in the United States, except that an ESV on U.S.-registered vessels may operate under control of a hub earth station location outside the United States provided the ESV operator maintains a point of contact within the United States that will have the capability and authority to cause an ESV on a U.S.-registered vessel to cease transmitting if necessary.

(8) ESV operators transmitting in the 5925-6425 MHz (Earth-to-space) frequency bands to GSO satellites in the fixed-satellite service (FSS) shall not seek to coordinate, in any geographic location, more than 36 megahertz of uplink bandwidth on each of no more than two GSO FSS satellites.

(9) ESVs shall not operate in the 5925-6425 MHz (Earth-to-space) and 3700-4200 MHz (space-to-Earth) frequency bands on vessels smaller than 300 gross tons.

(10) ESVs, operating while docked, that complete coordination with terrestrial stations in the 3700-4200 MHz band in accordance with §25.251, shall receive protection from such terrestrial stations in accordance with the coordination agreements, for 180 days, renewable for 180 days.

(11) ESVs in motion shall not claim protection from harmful interference from any authorized terrestrial stations or lawfully operating satellites to which frequencies are either already assigned, or may be assigned in the future in the 3700-4200 MHz (space-to-Earth) frequency band.

(12) ESVs operating within 200 km from the baseline of the United States, or within 200 km from a U.S.-licensed fixed service offshore installation, shall complete coordination with potentially affected U.S.-licensed fixed service operators prior to operation. The coordination method and the interference criteria objective shall be determined by the frequency coordinator. The details of the coordination shall be maintained and available at the frequency coordinator, and shall be filed with the Commission electronically via the International Bureau Filing System (<http://licensing.fcc.gov/myibfs/>) to be placed on public notice. The coordination notifications must be filed in the form of a statement referencing the relevant call signs and file numbers. Operation of each individual ESV may commence immediately after the public notice is released that identifies the notification sent to the Commission. Continuance of operation of that ESV for the duration of the coordination term shall be dependent upon successful completion of the normal public notice process. If, prior to the end of the 30-day comment period of the public

notice, any objections are received from U.S.-licensed fixed service operators that have been excluded from coordination, the ESV licensee shall immediately cease operation of that particular station on frequencies used by the affected U.S.-licensed fixed service station until the coordination dispute is resolved and the ESV licensee informs the Commission of the resolution.

(13) ESV operators must automatically cease transmission if the ESV operates in violation of the terms of its coordination agreement, including, but not limited to, conditions related to speed of the vessel or if the ESV travels outside the coordinated area, if within 200 km from the baseline of the United States, or within 200 km from a U.S.-licensed fixed service offshore installation. Transmissions may be controlled by the ESV network. The frequency coordinator may decide whether ESV operators should automatically cease transmissions if the vessel falls below a prescribed speed within a prescribed geographic area.

(b) Applications for ESV operation in the 5925-6425 MHz (Earth-to-space) band to GSO satellites in the fixed-satellite service must include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the applicable technical demonstrations in paragraphs (b)(1), (b)(2) or (b)(3) and the documentation identified in paragraphs (b)(4) through (b)(7) of this section.

* * * * *

(2) An ESV applicant proposing to implement a transmitter under paragraph (a)(2) of this section and using off-axis EIRP spectral-densities in excess of the levels in paragraph (a)(1)(i) or paragraph (a)(3)(i) of this section shall provide the following certifications and demonstration(s) as exhibits to its earth station application:

(i) * * *

(ii) * * *

(iii) * * *

(iv) Except for variable power ESVs applicants, a demonstration from the ESV operator that the ESV system is capable of detecting and automatically ceasing emissions within 100 milliseconds when the transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator. Variable power ESV applicants shall provide a detailed showing that an individual ESV terminal is capable of automatically ceasing or reducing emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator; that the individual transmitter is self-monitoring and capable of shutting itself off; and that one or more transmitters are capable of automatically ceasing or reducing emissions within 100 milliseconds of receiving the appropriate command from the system's central control and monitoring station if the aggregate off-axis EIRP spectral-densities of the transmitter or transmitters exceed the off-axis EIRP spectral-densities supplied to the target satellite operator.

(3) An ESV applicant proposing to implement an ESV system under paragraph (a)(3) of this section and using variable power-density control of individual simultaneously transmitting co-frequency ESV earth stations in the same satellite receiving beam shall provide the information in paragraphs (b)(3)(i) and (b)(3)(ii) as exhibits to its earth station application. The International Bureau will place these showings on Public Notice along with the application.

(i) The ESV applicant shall provide a detailed showing of the measures it intends to employ to maintain the effective aggregate EIRP-density from all simultaneously

transmitting co-frequency terminals operating with the same satellite transponder at least 1 dB below the EIRP-density limits defined in paragraph (a)(1)(i) of this section. In this context the term “effective” means that the resultant co-polarized and cross-polarized EIRP-density experienced by any GSO or non-GSO satellite shall not exceed that produced by a single ESV transmitter operating at 1 dB below the limits defined in paragraph (a)(1)(i) of this section.

(ii) The ESV applicant shall provide a detailed showing that an individual ESV terminal is capable of automatically ceasing or reducing emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limit specified in paragraph (a)(3)(i) and that the individual transmitter is self-monitoring and capable of shutting itself off. The ESV applicant shall also provide a detailed showing that one or more transmitters are capable of automatically ceasing or reducing emissions within 100 milliseconds of receiving the appropriate command from the system’s central control and monitoring station if the aggregate off-axis EIRP spectral-densities of the transmitter or transmitters exceed the off-axis EIRP-density limits specified in paragraph (a)(3)(i).

(4) There shall be an exhibit included with the application describing the geographic area(s) in which the ESVs will operate.

(5) The point of contact information referred to in paragraph (a)(4) of this section and, if applicable, paragraph (a)(7) of this section, must be included in the application.

(6) ESVs that exceed the radiation guidelines of §1.1310 of this chapter must provide, with their environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines.

(7) Except for ESV systems operating pursuant to paragraph (a)(2) of this section, ESV systems authorized pursuant to this section shall be eligible for a license that lists ALSAT as an authorized point of communication.

3. Amend Section 25.222 as follows:

- a. Revise paragraph (a) introductory text;
- b. Revise the first sentence of paragraph (a)(1)(ii) and paragraph (a)(1)(iii);
- c. Revise paragraph (a)(2);
- d. Revise paragraph (a)(2)(iii);
- e. Redesignate paragraphs (a)(3) through (a)(7) as paragraphs (a)(4) through (a)(8);
- f. Add new paragraph (a)(3);
- g. Revise paragraph (b) introductory text;
- h. Revise paragraph (b)(2);
- i. Revise paragraph (b)(2)(iv);
- j. Redesignate paragraphs (b)(3) through (b)(5) as paragraphs (b)(4) through (b)(6); and
- k. Add new paragraphs (b)(3) and (b)(7).

§ 25.222 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth)

frequency bands and transmitting in the 14.0–14.5 GHz (Earth-to-space) frequency band, operating with Geostationary Orbit (GSO) Satellites in the Fixed-Satellite Service.

(a) The following ongoing requirements govern all ESV licensees and operations in the 10.95-11.2 GHz (space-to-Earth), 11.45-11.7 GHz (space-to-Earth), 11.7-12.2 GHz (space-to-Earth) frequency bands and 14.0-14.5 GHz (Earth-to-space) bands transmitting to GSO satellites in the fixed-satellite service. ESV licensees must comply with the requirements in either paragraph (a)(1), (a)(2) or (a)(3) of this section and all of the requirements set forth in paragraphs (a)(4) through (a)(8) of this section. Paragraph (b) of this section identifies items that must be included in the application for ESV operations to demonstrate that these ongoing requirements will be met.

(1) * * *

(ii) Except for ESV systems operating under paragraph (a)(3), each ESV transmitter must meet one of the following antenna pointing error requirements:

(A) * * *

(B) * * *

(iii) Except for ESV systems operating under paragraph (a)(3), each ESV transmitter must meet one of the following cessation of emission requirements:

(A) * * *

(B) * * *

(2) The following requirements shall apply to an ESV that uses off-axis EIRP spectral-densities in excess of the levels in paragraph (a)(1)(i) or (a)(3)(i) of this Section. An ESV or ESV system operating under this subsection shall file certifications and provide a detailed demonstration(s) as described in paragraph (b)(2) of this section.

(i) * * *

(ii) * * *

(iii) The ESV shall operate in accordance with the off-axis EIRP spectral-densities that the ESV supplied to the target satellite operator in order to obtain the certifications listed in paragraph (b)(2) of this section. Except for ESVs with variable power systems, the ESV shall automatically cease emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator. For ESVs using variable power systems, the individual ESV transmitter shall automatically cease or reduce emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limits supplied to the target satellite operator; the individual transmitter must be self-monitoring and capable of shutting itself off; and if one or more ESV transmitters causes the aggregate off-axis EIRP-densities to exceed the off-axis EIRP-density limits supplied to the target satellite operator, then the transmitter or transmitters shall cease or reduce emissions within 100 milliseconds of receiving a command from the system's central control and monitoring station.

(3) The following requirements shall apply to an ESV system that uses variable power-density control of individual simultaneously transmitting co-frequency ESV earth stations in the same satellite receiving beam unless that ESV system operates pursuant to paragraph (a)(2). An ESV system operating under this subsection shall provide a detailed demonstration as described in paragraph (b)(3) of this section.

(i) The effective aggregate EIRP-density from all terminals shall be at least 1 dB below

the off-axis EIRP-density limits defined in paragraph (a)(1)(i), with the value of $N=1$. In this context the term "effective" means that the resultant co-polarized and cross-polarized EIRP-density experienced by any GSO or non-GSO satellite shall not exceed that produced by a single transmitter operating 1 dB below the limits defined in paragraph (a)(1)(i). An ESV system operating under this subsection shall provide a detailed demonstration as described in paragraph (b)(3)(i) of this section.

(ii) The individual ESV transmitter shall automatically cease or reduce emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limits specified in paragraph (a)(3)(i). The individual transmitter must be self-monitoring and capable of shutting itself off. If one or more ESV transmitters causes the aggregate off-axis EIRP-densities to exceed the off-axis EIRP-density limits specified in paragraph (a)(3)(i), then the transmitter or transmitters shall cease or reduce emissions within 100 milliseconds of receiving a command from the system's central control and monitoring station.

(4) There shall be a point of contact in the United States, with phone number and address, available 24 hours a day, seven days a week, with authority and ability to cease all emissions from the ESVs, either directly or through the facilities of a U.S. hub or a hub located in another country with which the United States has a bilateral agreement that enables such cessation of emissions.

(5) For each ESV transmitter, a record of the ship location (*i.e.*, latitude/longitude), transmit frequency, channel bandwidth and satellite used shall be time annotated and maintained for a period of not less than 1 year. Records will be recorded at time intervals no greater than every 20 minutes while the ESV is transmitting. The ESV operator will make this data available upon request to a coordinator, fixed system operator, fixed-satellite system operator, NTIA, or the Commission within 24 hours of the request.

(6) ESV operators communicating with vessels of foreign registry must maintain detailed information on each vessel's country of registry and a point of contact for the relevant administration responsible for licensing ESVs.

(7) ESV operators shall control all ESVs by a hub earth station located in the United States, except that an ESV on U.S.-registered vessels may operate under control of a hub earth station location outside the United States provided the ESV operator maintains a point of contact within the United States that will have the capability and authority to cause an ESV on a U.S.-registered vessel to cease transmitting if necessary.

(8) In the 10.95-11.2 GHz (space-to-Earth) and 11.45-11.7 GHz (space-to-Earth) frequency bands ESVs shall not claim protection from interference from any authorized terrestrial stations to which frequencies are either already assigned, or may be assigned in the future.

(b) Applications for ESV operation in the 14.0-14.5 GHz (Earth-to-space) band to GSO satellites in the fixed-satellite service must include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the applicable technical demonstrations in paragraphs (b)(1), (b)(2) or (b)(3) and the documentation identified in paragraphs (b)(4) through (b)(7) of this section.

* * * * *

(2) An ESV applicant proposing to implement a transmitter under paragraph (a)(2) of this section and using off-axis EIRP spectral-densities in excess of the levels in paragraph (a)(1)(i) or

paragraph (a)(3)(i) of this section shall provide the following certifications and demonstration(s) as exhibits to its earth station application:

(i) * * *

(ii) * * *

(iii) * * *

(iv) Except for variable power ESVs applicants, a demonstration from the ESV operator that the ESV system is capable of detecting and automatically ceasing emissions within 100 milliseconds when the transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator. Variable power ESV applicants shall provide a detailed showing that an individual ESV terminal is capable of automatically ceasing or reducing emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP spectral-densities supplied to the target satellite operator; that the individual transmitter is self-monitoring and capable of shutting itself off; and that one or more transmitters are capable of automatically ceasing or reducing emissions within 100 milliseconds of receiving the appropriate command from the system's central control and monitoring station if the aggregate off-axis EIRP spectral-densities of the transmitter or transmitters exceed the off-axis EIRP spectral-densities supplied to the target satellite operator.

(3) An ESV applicant proposing to implement an ESV system under paragraph (a)(3) of this section and using variable power-density control of individual simultaneously transmitting co-frequency ESV earth stations in the same satellite receiving beam shall provide the information in paragraphs (b)(3)(i) and (b)(3)(ii) as exhibits to its ESV application. The International Bureau will place these showings on Public Notice along with the application.

(i) The ESV applicant shall provide a detailed showing of the measures it intends to employ to maintain the effective aggregate EIRP-density from all simultaneously transmitting co-frequency terminals operating with the same satellite transponder at least 1 dB below the EIRP-density limits defined in paragraph (a)(1)(i) of this section. In this context the term "effective" means that the resultant co-polarized and cross-polarized EIRP-density experienced by any GSO or non-GSO satellite shall not exceed that produced by a single ESV transmitter operating at 1 dB below the limits defined in paragraph (a)(1)(i) of this section.

(ii) The ESV applicant shall provide a detailed showing that an individual ESV terminal is capable of automatically ceasing emissions within 100 milliseconds if the ESV transmitter exceeds the off-axis EIRP-density limit specified in paragraph (a)(3)(i) and that the individual transmitter is self-monitoring and capable of shutting itself off. The ESV applicant shall also provide a detailed showing that one or more transmitters are capable of automatically ceasing or reducing emissions within 100 milliseconds of receiving the appropriate command from the system's central control and monitoring station if the aggregate off-axis EIRP spectral-densities of the transmitter or transmitters exceed the off-axis EIRP-density limits specified in paragraph (a)(3)(i).

(4) There shall be an exhibit included with the application describing the geographic area(s) in which the ESVs will operate.

(5) The point of contact referred to in paragraph (a)(4) and, if applicable paragraph (a)(7) of this section, must be included in the application.

(6) ESVs that exceed the radiation guidelines of §1.1310 of this chapter must provide, with their

environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines.

(7) Except for ESV systems operating pursuant to paragraph (a)(2) of this section, ESV systems authorized pursuant to this section shall be eligible for a license that lists ALSAT as an authorized point of communication.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of Competition in) MB Docket No. 12-203
the Market for the Delivery of Video Programming)

NOTICE OF INQUIRY

Adopted: July 18, 2012

Released: July 20, 2012

Comment Date: September 10, 2012

Reply Comment Date: October 10, 2012

By the Commission: Commissioner Pai issuing a statement.

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I. INTRODUCTION

A. Scope of the Report

1. This Notice of Inquiry (“*Notice*”) solicits data, information, and comment on the state of competition in the delivery of video programming for the Commission’s Fifteenth Report (“15th Report”). We seek to update the information and metrics provided in the Fourteenth Report (“14th Report”)¹ and report on the state of competition in the video marketplace in 2011 and 2012. Using the information collected pursuant to this *Notice*, we seek to enhance our analysis of competitive conditions, better understand the implications for the American consumer, and provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers.

2. Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) amended the Communications Act of 1934² and established regulations for the purpose of increasing competition and diversity in multichannel video programming distribution, increasing the availability of satellite delivered programming, and spurring the development of communications technologies.³ To measure progress toward these goals, Congress required the Commission to report annually on “the status of competition in the market for the delivery of video programming.”⁴

3. In 1992, when Congress required the Commission to report annually on the status of competition in the market for the delivery of video programming, most consumers had the limited choice of receiving over-the-air broadcast television stations or subscribing to service from their local cable provider.⁵ As the 1990s progressed, cable overbuilders and the introduction of direct broadcast satellite (“DBS”) service provided additional alternatives for delivered video programming, introducing competition into multichannel video programming distribution (“MVPD”).⁶ Today, DBS provides video

¹ *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Report, FCC 12-81 (rel. July 20, 2012) (“14th Report”).

² 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1494 (1992) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.”).

³ Video programming is defined as: “Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use.” 47 U.S.C. § 522(20); 47 C.F.R. § 79.1(a)(1).

⁴ Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 548(g). The Commission’s previous reports appear at: *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 (1994) (“*First Report*”); 11 FCC Rcd 2060 (1996) (“*Second Report*”); 12 FCC Rcd 4358 (1997) (“*Third Report*”); 13 FCC Rcd 1034 (1998) (“*Fourth Report*”); 13 FCC Rcd 24284 (1998) (“*Fifth Report*”); 15 FCC Rcd 978 (2000) (“*Sixth Report*”); 16 FCC Rcd 6005 (2001) (“*Seventh Report*”); 17 FCC Rcd 1244 (2002) (“*Eighth Report*”); 17 FCC Rcd 26901 (2002) (“*Ninth Report*”); 19 FCC Rcd 1606 (2004) (“*Tenth Report*”); 20 FCC Rcd 2755 (2005) (“*11th Report*”); 21 FCC Rcd 2503 (2006) (“*12th Report*”); 24 FCC Rcd 542 (2007) (“*13th Report*”).

⁵ In most areas, consumers had only one choice of cable provider, although cable overbuilders offered another option in some areas. See *Tenth Report*, 19 FCC Rcd at 1659, ¶ 79.

⁶ Section 602 (13) of the Communications Act of 1934, as amended, defines a multichannel video programming distributor (“MVPD”) as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C.

(continued....)

programming to over 33.9 million subscribers, and cable offers video service to approximately 58 million subscribers.⁷ Major telephony providers, Verizon and AT&T, have steadily increased their respective multichannel video services since their inception in 2005 and 2006, respectively.⁸ Today, these entities provide video programming to a total of approximately 8.0 million subscribers.⁹ The increasing availability of video content over the Internet, made available by online video distributors (“OVDs”), further expands consumer choice.¹⁰

4. In the 14th Report, we adopted a number of changes to our analytic framework in an effort to be consistent with the framework used in recent wireless and satellite competition reports.¹¹ Under this new framework, we placed entities into one of three strategic groups – MVPDs, broadcast television stations, and OVDs. Within each of these categories, we addressed industry structure, conduct, and performance. The 14th Report also examined key industry inputs that may impact the market for the delivery of video programming, including the creators and aggregators of video programming,

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§ 522(13). The Media Bureau issued a Public Notice seeking comment on the interpretation of the terms “MVPD” and “channel,” and whether an entity must also provide its subscribers a transmission path to qualify under the statutory definition. *Media Bureau Seeks Comment On Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Rcd 3079 (MB 2012).

⁷ *Multichannel Market Trends*, SNL KAGAN, Mar. 13, 2012.

at <http://www.snl.com/interactivex/articles.aspx?id=14413841&KPLT=6> (visited Apr. 11, 2012).

⁸ See Verizon Communications Inc., *Verizon FiOS TV is Here!* (press release), Sept. 22, 2005 (announcing the unveiling of FiOS TV service in Keller, TX, its first market); AT&T Inc., *AT&T Delivers Strong Second-Quarter Earnings Growth Driven by Merger Integration Progress, Solid Wireline Execution, Advances at Cingular Wireless* (press release), July 25, 2006 (announcing expansion of its U-verse video service in San Antonio to additional neighborhoods and plans to expand U-verse video service to additional markets late in 2006). We note that in addition to Verizon FiOS and AT&T U-verse, some rural telephone companies also offer video services using their broadband infrastructure. See 14th Report ¶ 346.

⁹ AT&T Inc., *Annual Report for the Year Ended December 31, 2011*, at 38; Verizon Communications Inc., *Annual Report for the Year Ended December 31, 2011*, at 3.

¹⁰ An “OVD” is any entity that offers video content by means of the Internet or other Internet Protocol (IP)-based transmission path provided by a person or entity other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering online video content as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint. See *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4358, App. A (2011) (“*Comcast-NBCU Order*”). Consumers need a broadband connection to receive video content from OVDs. The issue of whether a certain type of OVD also qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint (Mar. 24, 2010). Nothing in this Notice should be read to state or imply our determination on that issue. See also 14th Report ¶ 237.

¹¹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664 (2011) (“15th Mobile Wireless Report”); *Third Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, Report and Analysis of Competitive Market Conditions with Respect Domestic and International Satellite Communications Services*, IB Docket Nos. 09-16 and 10-99, 26 FCC Rcd 17284 (2011) (“Third Satellite Competition Report”).

distribution strategies for video, and consumer premises equipment. In addition, we compared video programming competition in rural and urban areas for each of the three strategic groups.

5. We invite all interested parties to provide input for the 15th Report. We seek to collect data to gain further insight into such areas as the deployment of new technologies and services, as well as innovation and investment in the video marketplace. The entry of each new delivery technology provides consumers with increasing options in obtaining video content. We therefore request comment on industry structure, market conduct and performance, consumer behavior, urban-rural comparisons, and key industry inputs for video programming. To the extent possible, we request commenters to provide information and insights on competition using this framework.

6. In particular, we request data, information, and comment from entities that provide delivered video programming directly to consumers. These entities include MVPDs, broadcast television stations, and OVDs. We also seek data, information, and comment from entities that provide key inputs into video programming distribution. These include content creators and aggregators as well as manufacturers of consumer premises equipment, including equipment that enables consumers to view programming on their television sets and on other devices (*e.g.*, smartphones and tablets). In addition, we request data, information, and comment from consumers and consumer groups. The accuracy and usefulness of the 15th Report will depend on the quality of the data and information we receive from commenters in response to this *Notice*. We encourage thorough and substantive submissions from industry participants, as well as state and local regulators with knowledge of the issues raised. When possible, we will augment reported information with submissions in other Commission proceedings and from publicly available sources.

B. Analytic Framework

7. Under the analytic framework adopted in the 14th Report, first we categorize entities that deliver video programming into one of three groups: MVPDs, broadcast television stations,¹² or OVDs. Entities delivering video content are assigned to these strategic groups based on similar business models or combination strategies.¹³ Second, we examine industry structure, conduct, and performance, considering factors such as:

¹² We expect to consider broadcast television stations separately for the 15th Report, as we have done in previous reports. Although broadcasters have transitioned to digital transmission and have the capability to offer additional linear channels, they still offer far fewer programs than are available from MVPDs and do not provide a subscription service. The Commission has previously held that broadcast television alone is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market. Accordingly, we treat broadcasters as part of a separate group. See *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 509 ¶ 75 (2004) (citing *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962, 5003, ¶ 69 (1990)); *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20607-09, ¶¶ 109-115 (2002).

¹³ As we did for the 14th Report, we assign entities that deliver video content to one of three groups based on the "strategic group" concept used in strategic management that groups companies within an industry that have similar business models or similar combinations of strategies. See Michael E. Porter, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* 129-155 (Free Press) (1980). The three groups also may be said to represent the historical development of delivered video where consumers initially had access to over-the-air broadcast television, then a growing number of MVPDs, and most recently the Internet. Our placement of
(continued....)

- *Structure*: The number and size of firms in each group, horizontal and vertical integration, merger and acquisition activity, and conditions affecting entry and the ability to compete.
- *Conduct*: The business models and competitive strategies used by firms that directly compete as video programming distributors, including product differentiation, advertising and marketing, and pricing.
- *Performance*: The improvements in the quantity, quality, and delivery methods of programming to subscribers, subscriber and penetration rates, financial indicators (e.g., revenue and profitability), and investment and innovation activities.

Third, we look upstream and downstream to examine the influence of industry inputs and consumer behavior on the delivery of video programming. In the *14th Report*, we discussed two key industry inputs: video content creators and aggregators and consumer premises equipment.¹⁴

8. We seek comment on whether the analytic framework adopted in the *14th Report* is a useful way for the Commission to evaluate and report on the status of video programming competition or whether modifications are needed for the *15th Report*. Do the three strategic group classifications allow us to adequately assess the interaction across these groups? Are an entity's business incentives or competitive concerns affected by operating in more than one group? How does the placement of entities into strategic groups affect by their ability to offer multiple services (i.e., video, voice and broadband)? What influence do industry structure, conduct, and performance have on one another?

C. Data

9. The data reported in previous reports on the status of competition for the delivery of video programming were derived from various sources, including data the Commission collects in other contexts (e.g., FCC Form 477 and FCC Form 325),¹⁵ comments filed in response to notices of inquiry and other Commission proceedings; publicly available information from industry associations; company filings and news releases; Security and Exchange Commission filings; data from trade associations and government entities; data from securities analysts and other research companies and consultants; company news releases and websites; corporate presentations to investors, newspaper and periodical articles; scholarly publications; vendor product releases; white papers; and various public Commission filings, decisions, reports, and data. We seek comment on whether there are additional data sources available for our analysis. What other sources of data, especially quantitative data, should we use to perform a comprehensive analysis of the market for the delivery of video programming? Are there certain stakeholders we should reach out to in order to diversify the data and further supplement the record?

10. In previous Notices of Inquiry, we have requested data as of June 30 of the relevant year to monitor trends on an annual basis.¹⁶ To continue our time-series analysis, we request data as of June

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delivered video providers into one of three groups is an organizational convenience to facilitate discussion. See *14th Report* ¶ 15 n.19.

¹⁴ As described more fully below in Section IV, content creators are firms that produce video programming and content aggregators are entities that assemble packages of video programming for distribution by MVPDs, broadcasters, and OVDs.

¹⁵ FCC Form 477 collects information about broadband connections to end user locations, wired and wireless local telephone services, and interconnected Voice over IP services, in individual states. FCC Form 325 is the Cable Television System Report that collects information about cable television systems.

¹⁶ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269; Notice of Inquiry, 24 FCC Rcd 750, 751, ¶ 2 (2009); *Annual Assessment of the Status of* (continued....)

30, 2011, and June 30, 2012. We also recognize that a significant amount of data and information are reported on a calendar year basis, and as such, we ask commenters to provide year-end 2011 data when readily available and relevant.

II. PROVIDERS OF DELIVERED VIDEO PROGRAMMING

11. In this section, we seek information and comment that will allow us to analyze the structure, conduct, and performance of MVPDs, broadcast television stations, and OVDs. To improve our description and analysis of the video products within each group, we seek specific and granular quantitative and qualitative data as well as information from companies in each group. In addition, we request comment from the perspective of consumers, advertisers, content aggregators, content creators, and/or consumer premises equipment manufacturers on whether and to what extent MVPDs, broadcast stations, and OVDs consider the other two groups' offerings to be complements and/or substitutes for one another.

A. Multichannel Video Programming Distributors

1. MVPD Structure

12. MVPDs include all entities that make available for purchase multiple channels of video programming.¹⁷ In our *14th Report*, we determined that most MVPD subscribers use cable, DBS, or telephone MVPDs for their video service.¹⁸ Fewer than one percent of MVPD subscribers use other types of MVPDs (e.g., home satellite dishes ("HSD"), open video systems ("OVS"), wireless cable systems,¹⁹ and private cable operators ("PCOs"))²⁰. We also found that little reliable data is available for these other types of MVPDs.²¹ We request comment on the extent to which these other types of MVPDs should be included in the *15th Report*.

13. For each type of MVPD, we seek data on the number of MVPD providers, the number of homes passed, the number of subscribers for delivered video programming, the number of linear channels and amount of non-linear programming offered,²² the ability of subscribers to watch programming on multiple devices, and the geographic area in which individual providers offer service. In addition, we seek comment on the most appropriate unit of measurement for assessing geographic coverage. We note that different types of MVPDs may report data regarding availability and use that is not standardized to a common geographic unit. This greatly hinders our ability to assess the competitive alternatives available to homes and to identify where MVPDs are engaged in head-to-head competition. In the *14th Report*, we addressed this concern in the context of estimating the number of homes with access to multiple

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Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, Notice of Inquiry, 21 FCC Rcd 12229, 12230, ¶ 2 (2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Notice of Inquiry, 20 FCC Rcd 1117, 1118, ¶ 2 (2005).

¹⁷ See *supra* note 6 (defining an MVPD).

¹⁸ *14th Report* ¶¶ 26-34.

¹⁹ Wireless cable systems use the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") to transmit video programming to consumers.

²⁰ Private cable operators were formerly known as satellite master antenna ("SMATV") systems.

²¹ *14th Report* ¶ 35.

²² A linear channel is one that distributes programming at a scheduled time. Non-linear programming, such as video-on-demand ("VOD") and online video content, is available at a time of the viewer's choosing.

MVPDs.²³ We therefore seek data and information on the number of homes that are passed by one MVPD, two MVPDs, and three or more MVPDs. We wish to identify those markets and geographic areas where head-to-head competition exists, where entry is likely in the near future, and where competition once existed but failed. What factors influence a subscriber's decision to switch from one type of MVPD service to another, for instance from cable MVPD service to DBS MVPD service or vice versa?

14. We request information identifying differences between cable, DBS, and telephone MVPD subscribers. Are DBS subscribers more likely to reside in rural areas or areas not served by cable systems? What percentage of homes cannot receive DBS service because they are not within the line-of-site of the satellite signal? In addition, we request updated information on the number of markets where DBS operators provide local-into-local broadcast service. Particular MVPD providers offer bundles of multiple services, including broadband, voice, and mobile wireless services. How, if at all, do these bundled offerings affect competition? For example, what affect, if any, does the inability of DBS operators to directly provide broadband, voice, and mobile wireless services along with their video service have on competition among and the financial performance of MVPDs?

15. With respect to non-contiguous states, do DBS MVPDs offer the same video packages at the same prices in Alaska and Hawaii as they offer in the 48 contiguous states? Do subscribers need different or additional equipment to receive video services in these states?

16. We seek comment on other MVPDs such as HSD²⁴ and PCOs.²⁵ Are these technologies still relevant today? If so, how are they relevant and to what extent are they available?

17. The Commission has not addressed the extent to which wireless providers offering video programming to mobile phones and other wireless devices should be classified as MVPDs under the Act, and we do not intend to do so within the context of this proceeding. We note that, in past reports, the Commission considered certain of these providers in its analysis of video competition.²⁶ For the 15th Report, we request information on the extent to which mobile wireless providers continue to offer video

²³ 14th Report ¶ 40 & Table 2.

²⁴ In HSD, subscribers use a large dish and receive signals transmitted by satellites operating in the C- and Ku-band frequencies. HSD channels may be transmitted either as clear channels, available for free reception, or as scrambled signals. To receive scrambled channels, a household must purchase an integrated receiver-decoder and pay a subscription fee. HSD systems are typically designed to receive programming from several different satellites at several different orbital locations. Most HSDs include motors that permit the receiving dishes to rotate and receive signals from these many satellites. Space considerations and zoning regulations restrict many viewers' ability to install the large antenna needed for HSD reception, typically ranging from 4 to 8 feet in diameter. 13th Report, 24 FCC Red at 588-589, ¶ 93. Today, few entities offer a HSD subscription service. 14th Report ¶ 35.

²⁵ PCOs collect video signals using satellite master antenna systems and distribute programming via wiring in apartments, condominiums, hotels, and office buildings. PCOs do not use any public rights-of-way. 47 U.S.C. § 522(7). In addition, PCOs and SMATV operators: (a) do not pay franchise and Federal Communications Commission subscriber fees; (b) are not obligated to pass every resident in a given area; (c) are not subject to rate regulation; and (d) are not subject to must carry and local government access obligations. *Fourth Report*, 13 FCC Red at 1085, n.296. In the 14th Report, we found that PCOs accounted for the majority of alternative MVPD subscribers in 2011, with approximately 650,000 subscribers. This represents a decline from 900,000 subscribers in 2006. 14th Report ¶ 35.

²⁶ In the past, mobile wireless service providers offered a range of video programming services to their customers. See 13th Report, 24 FCC Red at 610-612, ¶¶ 142-149; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Thirteenth Report, 24 FCC Red 6185, 6203-04, ¶¶ 24-26 (2009).

programming to their customers. How has this changed during 2011 and the first half of 2012, and what are the reasons for such changes? How and to what extent do mobile wireless providers and MVPDs use wireless technologies, including Wi-Fi and wireless broadband, to provide video programming today, and what trends should we anticipate for the future? How do these services compete with or complement the traditional video programming services offered by MVPDs and by other providers of video programming?

18. *Horizontal Concentration.* In the 14th Report, we did not directly measure horizontal concentration for video distribution. Rather, we estimated the number of homes on a nationwide basis that have access to two, three, or four MVPDs.²⁷ We seek comment on the value of our approach. We also seek data or comment on what information we can acquire to assist us in performing this analysis. Likewise, we invite analysis regarding the relationship between horizontal concentration and competition. To what extent does horizontal concentration affect price or quality of service?

19. In merger reviews, the Commission routinely examines horizontal concentration. It has classified MVPD service as a distinct product market and found individual homes to be the appropriate focus regarding competitive choices.²⁸ In the 15th Mobile Wireless Report, the Commission applied the Herfindahl-Hirshman Index ("HHI") to shares of mobile wireless connections held by facilities-based wireless providers at the level of Economic Areas, calculating shares of connections from the providers' number of connections.²⁹ These Economic Areas are compiled based on census block data. For purposes of the 15th Report, we seek comment on the appropriate methodology for calculating concentration in delivered video services. Should we continue to consider MVPDs a separate product market,³⁰ or are there narrower or broader product segments we should consider? What are the appropriate geographic markets associated with these product markets (e.g., individual households, census tracts, or cable franchise areas)?

20. *Vertical Integration.* In 1992, Congress enacted provisions related to common ownership between cable operators and video programming networks.³¹ In the 14th Report, we discussed vertical integration in terms of affiliations between programming networks and MVPDs. Specifically, we identified the number of national video programming networks affiliated with one or more MVPDs.³² Similarly, we reported on regional programming networks affiliated with MVPDs.³³ We also

²⁷ 14th Report ¶ 40.

²⁸ See *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4255-57, ¶¶ 40, 42 (2011) ("Comcast-NBCU Order"); *Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8235, ¶¶ 63-64 (2006).

²⁹ 15th Mobile Wireless Report, 26 FCC Rcd at 9708, ¶ 49.

³⁰ In past reports, the Commission has considered MVPDs to be a distinct product market. See, e.g., 14th Report ¶¶ 18-24; 13th Report, 24 FCC Rcd at 545, ¶ 5.

³¹ 47 U.S.C. § 533.

³² See 14th Report ¶¶ 42-45. See also 14th Report, App. B, Table B-1.

³³ See 14th Report, App. C, Table C-1.

differentiated between the availability of standard definition ("SD") and high definition ("HD") versions of individual networks consistent with recent Commission decisions.³⁴

21. We anticipate reporting this type of information again in the 15th Report. We therefore request data, information, and comment on vertical integration between MVPDs and video programming networks. In particular, we request information on satellite and terrestrially delivered national and regional networks.³⁵ How should we measure such vertical integration? For purposes of analyzing vertical integration, how should we determine affiliation? Should we use a minimum ownership share or apply standards similar to those contained in our attribution rules rather than report on any known affiliations as we have done in the past?

22. *Conditions Affecting Entry and Rivalry.*³⁶ Underlying regulatory, technological, and market conditions affect market structure and influence the total number of firms that can compete successfully in the market. We invite comments and information regarding the conditions that affect the entry into MVPD markets and rivalry among MVPDs.

23. *Regulations Affecting Entry and Rivalry.* A number of provisions of the Communications Act and the Commission's rules affect MVPD operators in the market for the delivery of video programming. These include, for example, regulations governing program access,³⁷ program carriage,³⁸ must carry,³⁹ retransmission consent,⁴⁰ franchising,⁴¹ effective competition,⁴² access to multiple dwelling units,⁴³ exclusivity,⁴⁴ inside wiring,⁴⁵ leased access,⁴⁶ ownership,⁴⁷ over-the-air reception devices,⁴⁸ and

³⁴ See, e.g., *Review of Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Red 746, 785, ¶ 55 (2010) ("2010 Program Access Order"), *aff'd in part and vacated in part sub nom. Cablevision Systems Corp. et al. v FCC*, 649 F.3d 695 (D.C. Cir. 2011).

³⁵ See generally *2010 Program Access Order*. The Commission defines satellite-delivered programming as programming delivered to MVPDs via satellite. Similarly, terrestrially delivered programming is defined as programming delivered to MVPDs via terrestrial means, such as programming transmitted to MVPDs by fiber. See *id.* at 748-49, ¶¶ 4, 5. National networks are distributed throughout the entire country (e.g., CNN, Discovery Channel, and HBO); regional networks are only provided in certain geographic areas (e.g., Comcast SportsNet Philadelphia and Arizona News Channel).

³⁶ By rivalry, we mean competition among participants in the same product and geographic market. Although a consumer typically selects one MVPD, the rivalry among MVPD firms for that consumer does not end because the consumer can switch MVPDs where more than one is available.

³⁷ 47 U.S.C. § 548; 47 C.F.R. §§ 76.1001-04.

³⁸ 47 U.S.C. § 536; 47 C.F.R. §§ 76.1301-02.

³⁹ 47 U.S.C. §§ 534-35; 47 C.F.R. § 76.56.

⁴⁰ 47 U.S.C. § 525(b); 47 C.F.R. § 76.64.

⁴¹ 47 U.S.C. § 541; 47 C.F.R. § 76.41.

⁴² 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(b).

⁴³ 47 C.F.R. § 76.2000.

⁴⁴ 47 C.F.R. §§ 76.92, 76.101, 76.111.

⁴⁵ 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.801-06.

⁴⁶ 47 U.S.C. § 532; 47 C.F.R. § 76.701.

⁴⁷ 47 U.S.C. § 533(f); 47 C.F.R. §§ 76.501, 76.503-04.

⁴⁸ 47 U.S.C. § 303 note; 47 C.F.R. § 1.4000.

public interest programming.⁴⁹ We seek comment on the impact of these regulations and other Commission rules on entry and rivalry among MVPDs. Are MVPDs identifying the costs attributed to any of these regulations (e.g., retransmission consent) on the bills of their subscribers?

24. We also request data on the number of channels MVPDs dedicate on their respective systems to must-carry: public, educational, and governmental (“PEG”); and leased access programming. On which tier are these channels placed and is extra equipment required to view them? Are there more or fewer PEG and leased access channels carried on MVPD systems than were carried as of June 2010? What data sources exist to track the availability of PEG and leased access programming? We recognize that the regulations applicable to cable operators may differ from the regulations applicable to DBS systems and other MVPD operators. How do regulatory disparities affect MVPD rivalry? We also solicit comment on specific actions the Commission can take to facilitate MVPD entry and rivalry with the intent to increase consumer choice in the delivery of video programming. In addition, we request comment on any state or local regulations that affect entry and rivalry among MVPDs.

25. *Non-Regulatory Conditions Affecting Entry and Rivalry.* We seek information and comment on non-regulatory conditions affecting MVPD entry and rivalry, including the availability of programming. Do these conditions include economies of scale, where large MVPDs can spread fixed costs over more subscribers or negotiate lower prices for video content? Do these conditions also include expected retaliation, where potential MVPD entrants believe incumbents will lower prices to any home considering switching to the new MVPD entrant? What other non-regulatory conditions influence MVPD entry and rivalry?

2. MVPD Conduct

26. *Business Models and Competitive Strategies.* MVPDs may choose from a variety of business models and competitive strategies to attract and retain subscribers and viewers. MVPDs decide, for example, the type of delivered video services they will offer, the programming they offer consumers, and how they package the programming (i.e., the number of tiers of video programming and the specific programming carried on each tier); the complementary product features they will offer (e.g., HD, DVR (digital video recorder), video-on-demand (“VOD”), online video programming to PCs and mobile devices, and bundled services where telephony and/or broadband is packaged with video service). MVPDs also decide the level of advertising, the degree of vertical integration with suppliers of video programming, whether to initiate or respond to price discounting, and their approach to customer service.

27. We seek descriptions of the varied business models and strategies used by MVPDs for the delivery of video programming. What are key differences among the business models and strategies in terms of services offered to consumers? How do providers distinguish their delivered video services from their rivals? Do cable, DBS, and telephone MVPDs offer comparable video services? Does DBS “local-into-local” delivery of broadcast television signals make it a closer substitute for cable than it would be otherwise? We note that content creators have negotiated “TV Everywhere” agreements⁵⁰ in

⁴⁹ A franchising authority may require a cable operator to use channel capacity for public, educational, or governmental (PEG) use. 47 U.S.C. §§ 531, 541(a)(4)(B). DBS operators are required to reserve 4 percent of their channel capacity for noncommercial programming of an educational or informational nature. 47 U.S.C. § 335(b)(1)(A); 47 C.F.R. § 25.701(f).

⁵⁰ “TV Everywhere” is an initiative, which allows subscribers of certain MVPD services to access MVPD video programming on stationary and mobile Internet-connected devices including: televisions, computers, tablets, and smartphones. MVPDs market their TV Everywhere initiatives under a variety of brand names (e.g., Comcast’s Xfinity, and TWC TV™).

which MVPD subscribers receive access to programming via VOD, online, and mobile wireless devices.⁵¹ To what extent do MVPDs view VOD and TV Everywhere service offerings, both online and on mobile wireless devices, as ways to retain existing subscribers and attract new ones? How extensively do MVPDs offer specialized services to consumers (e.g., multi-room DVR service, more channels, more HD, video content online, access to content on mobile devices, and/or a variety of bundles⁵²)? How do MVPDs advertise their services to existing and potential subscribers? What delivered video services do they feature in their advertising?

28. We also seek information regarding the pricing behavior of MVPDs. How does the price MVPDs pay for programming, including sports programming, impact the prices they charge to consumers?⁵³ Are the prices of MVPD video packages and services easily identifiable and well-explained on consumers' monthly bill and/or MVPDs' web sites and other promotional materials? To what extent do providers of MVPD service reduce prices or offer promotion pricing to attract new subscribers and/or retain existing subscribers? Do providers negotiate with individual subscribers over prices before and after introductory periods? Do homes that subscribe to the same delivered video services, from the same provider, in the same geographic area, pay different prices? How do bundles of service (i.e., packages that combine video, voice, equipment, and/or Internet service) affect the price charged for video services? To what extent have MVPDs been raising prices?

29. We are interested in learning whether an increase in the number of MVPD rivals affects pricing strategies. Do MVPDs charge lower prices (or use different pricing strategies) to homes that have access to multiple MVPDs? For its Annual Cable Price Survey, the Commission collects price data from a sample of cable systems, but does not collect price data for other types of MVPDs (e.g., DBS and AT&T U-verse).⁵⁴ We seek price data for MVPDs not included in the Annual Cable Price Survey, such as the monthly rate for both the lowest programming package and any equipment needed to access the video service. What additional data sources on MVPD prices are available for our 15th Report?

⁵¹ SNL Kagan, *Economics of Mobile Programming*, 2011 Edition, at 7.

⁵² Many MVPDs offer video, high-speed Internet, and wireline and/or wireless telephone services in bundles of two, three, or four services to consumers at discounted introductory prices and/or savings on the long-term price of each service compared to the price of buying each service separately.

⁵³ MVPDs are experimenting with low-cost programming packages in a limited number of markets. For example Cox Communications offers an economy package for \$35 a month that includes several basic cable networks, but excludes ESPN and regional sports networks ("RSNs"). Comcast and Time Warner Cable have also tested and offered similar tiers. Colin Dixon, *Prices Up, Subscribers Down: Can Value Packages Save Cable?*, THE DIFFUSION GROUP, at <http://tdgresearch.com/blogs/ottmonitor/archive/2012/01/27/prices-up-subscribers-down-can-value-packages-save-cable.aspx> (visited May 22, 2012). DISH Network, which positions itself as a low-cost MVPD (in contrast to sports-centric DIRECTV, which offers exclusive NFL Sunday Ticket programming), has reportedly considered dropping ESPN if it does not agree to be distributed on a separate sports tier, to keep prices in check for subscribers who are non-sports fans. In New York, DISH Network has dropped RSNs SportsNet New York, YES, and MSG Plus. DISH Network CEO Charlie Ergen has stated that if only 15 percent of subscribers in a market actually watch sports programming, it may be a good idea for one of the MVPDs not to carry RSNs. Derek Baine, *Dish to Dump ESPN?*, SNL KAGAN, Sept. 13, 2011, at 11.

⁵⁴ Section 623(k) of the Communications Act, as amended by the 1992 Cable Act, requires the Commission to publish a statistical report on average rates charged for the basic cable service and cable programming service tiers, and cable equipment. See, e.g., *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 27 FCC Red 2427 (MB 2012).

30. We also seek information on the competitive strategies of MVPDs in providing VOD and TV Everywhere programming on fixed and mobile devices. In particular, we are interested in learning what competitive issues MVPDs encounter when acquiring content for VOD and TV Everywhere from content creators and aggregators. Does the horizontal or vertical integration of content creators or aggregators, particularly companies that own broadcast television stations as well as broadcast and cable networks and studios, impact the ability of MVPDs to acquire rights to programming or the price of the programming? How does the size of an MVPD impact its bargaining power in such negotiations?

31. We seek data and comment on the provision of local news and sports by MVPDs as a competitive strategy in the delivery of video programming. What other types of local programming do MVPDs offer? What data sources are available to help in our analysis of MVPD provision of local news and sports, as well as other local programming?

32. *Conduct Resulting from Horizontal and Vertical Mergers.* As discussed above, we seek data, information, and comment on trends in horizontal and vertical mergers and acquisitions.⁵⁵ Has any MVPD acquired sufficient market power to impair competition? If so, how has competition been impaired? What consumer benefits, if any, have recent horizontal and vertical mergers achieved?⁵⁶ In addition, we invite comment on any other issues concerning MVPD conduct that will assist our analysis of competition in the delivery of video programming by MVPDs.

3. MVPD Performance

33. We seek comment on the information and time-series data we should collect for the analysis of various MVPD performance metrics. In the 14th Report, we considered performance metrics such as subscribership and penetration rates, financial performance, and investment and innovation.⁵⁷ We expect to continue to report on these metrics in the 15th Report. Are there other metrics that would enhance our analysis of MVPD performance? To the extent commenters suggest other metrics, we request data for their use in preparation of the 15th Report.

34. *Quantity and Delivery Methods.* We seek data, information, and comment on trends in the number of linear video channels as well as VOD and TV Everywhere video content offered by MVPDs to fixed and mobile devices. Has the number of linear channels and/or the number of VOD and TV Everywhere programs available increased? What are the most popular MVPD programming packages? Describe these packages in terms of the total number of analog and SD channels, number of HD channels, and number of VOD and TV Everywhere offerings. Are there geographic differences with respect to programming choices? How is the deployment of next-generation MVPD technologies⁵⁸ affecting the amount of programming MVPDs offer subscribers on a linear and non-linear basis? What effect has the entry of additional MVPDs had on programming choices and improvements in the delivery of video programming? What impact has the growth in OVD services had on MVPD services, in particular the deployment of VOD and TV Everywhere services?⁵⁹ What are the subscription levels for DVR and HD services? How many VOD titles are viewed per system?

⁵⁵ See *supra* Section II.A.1 (discussing MVPD market structure, specifically horizontal concentration and vertical integration).

⁵⁶ See, e.g., *Comcast-NBCU Order*.

⁵⁷ 14th Report ¶¶ 134-54.

⁵⁸ For example, some MVPDs have started to deploy multi-room DVR and home network solutions as well as cloud-based user interfaces in an effort to offer their subscribers flexibility in viewing and greater access to video programming. See 14th Report ¶¶ 390-91.

⁵⁹ See *infra* Section II.C (discussion of OVDs).

35. *Subscribership and Penetration Rates.* We seek data and information regarding the number of homes passed nationally, the number of subscribers, and the resulting penetration rate for MVPD service.⁶⁰ We also request data regarding trends in the number of new homes that subscribe to MVPD services. In addition, we solicit subscription data for the channel lineup packages (including international, other specific genres, and premium) and other delivered video programming services that MVPDs currently market to consumers.⁶¹ What percentage of customers subscribe to these video packages and other delivered video programming services? How does subscription and penetration data vary by geographic region for MVPDs? What is the level of “churn” (*i.e.*, consumer switching among MVPDs) and is it increasing or decreasing?

36. *Financial Performance.* We request information on various measures of MVPD financial performance, including data on MVPD revenues, cash flows, and margins. To the extent possible, we seek five-year time-series data to allow us to analyze trends. We are interested in the performance of the MVPD industry as a whole as well as the performance of individual MVPDs. What is the average revenue per MVPD subscriber?⁶² What are the major sources of video-related revenue for MVPDs? What percentage of total revenue is derived from each of these sources? What are the major video-related drivers of revenue growth? What are the major sources of costs for MVPDs, including programming costs? What is the impact of such costs on MVPDs? We seek data, information, and comments regarding profitability. What metrics and data should we use to measure profitability (*e.g.*, return on invested capital, operating margins)? Are there any other quantitative or qualitative metrics that would add to our analysis of MVPD financial performance? We recognize that many MVPDs also provide non-video services, such as voice and high-speed Internet services, along with video service often offered on a bundled basis. We also note that MVPDs may cross-subsidize services.⁶³ Our focus, however, is delivered video programming, and commenters submitting financial data should separate video from non-video services. Commenters should specify the methodology each firm uses for allocating joint and common costs. Likewise, commenters should explain the methodology each firm uses for allocating bundled revenue.

37. *Investment and Innovation.* We ask commenters to provide information concerning MVPDs’ investments in the market for video programming, including investment levels over time, investment per subscriber, investment as a percentage of revenue, and capital expenditures by individual MVPDs. Does investment vary by geographic region or between national and regional providers? What innovative services or technologies are MVPDs currently deploying? What is driving this deployment? In addition, we seek comment on how investment and innovation affect competition among MVPDs and other providers of delivered video programming. Have OVDs spurred investment and innovation by MVPDs? To what extent do content aggregators and creators as well as manufacturers of consumer premises equipment influence MVPD investment and innovation?

38. We also request information on the pace at which MVPDs are deploying, or have plans to deploy, new technologies, including transitioning from analog, or hybrid analog/digital, to all-digital distribution, adding IP-delivered video programming, deploying more efficient video encoding technologies (*e.g.*, MPEG-4), deploying enhanced transmission technologies (*e.g.*, DOCSIS 3.0) and

⁶⁰ We define penetration as the number of subscribers to an MVPD service expressed as a percentage of the number of homes that have access to the MVPD.

⁶¹ See *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Notice of Proposed Rulemaking, 26 FCC Red 1508, 1536-38, ¶¶ 77-88 (2011) (“*Form 477 Modernization NPRM*”).

⁶² See *id.* at 1535, ¶¶ 71-73.

⁶³ See 14th Report ¶¶ 110, 116, 131-32.

expanding 3-D services. To the extent that MVPDs are migrating to digital or otherwise repurposing spectrum, we seek comment on what new or additional services are they providing to consumers (e.g., more HD channels, broadband, VOD, etc.).

B. Broadcast Television Stations

1. Broadcast Television Structure

39. Providers of broadcast television service include both individual and group owners that hold licenses to broadcast video programming to consumers. Consumers who do not subscribe to an MVPD service may rely on over-the-air distribution of broadcast televisions for their video programming. Also, many MVPD homes receive broadcast television stations over-the-air on television sets that they have chosen not to connect to MVPD service.⁶⁴ The Commission already collects data on the number of broadcast television stations in each designated market area (“DMA”) and ownership of broadcast television stations using our CDBS database,⁶⁵ and purchases data from BIA/Kelsey⁶⁶ and The Nielsen Company.⁶⁷ We seek additional data concerning the number of households that rely on over-the-air broadcast television service, either exclusively or supplemented with OVD service, rather than receiving broadcast programming from an MVPD. In addition to the number of homes relying on over-the-air broadcast service, we request information regarding any demographic and geographic characteristics of such households. We also seek data on the percentage of households that own television sets, *i.e.*, the total number of television households.⁶⁸ We also seek data regarding the number of households with DVRs and HD sets. How many households routinely view broadcast programming over-the-air in addition to subscribing to an MVPD?

40. *Horizontal Concentration.* We are interested in tracking common ownership of broadcast stations nationally and by DMA. Commission rules limit the number of broadcast television stations an entity can own in a DMA, depending on the number of independently owned stations in the market.⁶⁹ The Commission already collects data that we can use to assess the horizontal structure of broadcast television stations, including the number of stations in each DMA and the ownership of each station.⁷⁰ Is

⁶⁴ *Id.* ¶ 155.

⁶⁵ The Commission collects data on broadcast stations through the Broadcast Radio and Television Electronic Filing System (CDBS). See Federal Communications Commission, Media Bureau: MB-CDBS: CDBS Public Access, http://licensing.fcc.gov/prod/cdbbs/pubacc/prod/cdbbs_pa.htm. We collect ownership data on FCC Form 323 – Ownership Report for Commercial Broadcast Station – and the data are available in CDBS.

⁶⁶ See BIA/Kelsey, Broadcast Media Resources, <http://www.biakelsey.com/Research-and-Forecasts/Broadcast-Media-Resources/> (visited May 22, 2012).

⁶⁷ Under Commission rules, broadcast television stations serve a community of license. However, Nielsen’s DMA market definition is commonly used as the geographic coverage area for broadcast television stations. A DMA is a group of counties that form an exclusive geographic area in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs, covering the entire continental United States, Hawaii, and parts of Alaska. The DMA boundaries and DMA data are owned solely and exclusively by The Nielsen Company. See Nielsen, <http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/tv/nielsen-2012-local-DMA-TV-penetration.pdf> (visited May 22, 2012).

⁶⁸ The 14th Report indicates that the number of television households in the United States increased each year from 2006-2010, but began to decline in 2011. 14th Report, Table 15.

⁶⁹ 47 C.F.R. § 73.3555.

⁷⁰ See 14th Report ¶¶ 166-170.

there other available data that may better inform our assessment of horizontal concentration in the broadcast station industry?

41. *Vertical Integration.* The Commission has collected data that we can use to analyze trends in vertical integration, including data on the number of broadcast stations owned by or affiliated with video content creators and aggregators.⁷¹ For the 15th Report, we seek to report on the vertical integration of broadcast television stations with broadcast networks and cable networks as we have done in the past. As such, we seek data on the vertical structure of the broadcast television industry. How many broadcast television stations, nationally and within each DMA, are vertically integrated with a broadcast network or a cable network? What, if any, trends exist with respect to the vertical integration between television stations and broadcast networks or cable networks? How does the vertical integration of television stations with broadcast networks, cable networks, and studios affect their ability to negotiate with MVPDs and OVDs for carriage rights? We also seek comment on ways to improve our analysis of vertical integration.

42. We also request data, information, and comment on the impact of horizontal and vertical combinations on the competitive condition of broadcast television stations with respect to the delivery of video programming. Does group ownership of broadcast stations within a DMA and/or across DMAs affect advertising revenue? Does group ownership within a DMA or across DMAs affect the price paid for video content? Are broadcast television stations that are vertically integrated with broadcast television networks better able to compete in the delivery of video programming? Do joint sales agreements ("JSAs"),⁷² local marketing agreements ("LMAs"),⁷³ and shared services agreements ("SSAs")⁷⁴ impact the provision of programming to the public? Do these types of sharing arrangements affect the competitiveness of independent stations?

43. *Conditions Affecting Entry and Rivalry.* The Commission's spectrum allocation and licensing policies affect the structure of broadcast television by limiting the number of stations located in a given geographic area.⁷⁵ Other Commission rules limit the number of broadcast television stations an entity can own in a DMA as well as limit the national audience reach of commonly owned broadcast television stations.⁷⁶ Congress recently enacted legislation that provides for voluntary participation of broadcast station licensees in "reverse auctions" in which they may offer to relinquish some or all of their licensed spectrum usage rights in exchange for a share of the proceeds from a "forward auction" of

⁷¹ See 14th Report, Apps. B & C, Tables B-2 & C-2. See also *supra* Section II.A.1 (discussing MVPD vertical integration).

⁷² A JSA is "an agreement with a licensee of a 'brokered station' that authorizes a 'broker' to sell advertising time for the 'brokered station.'" 47 C.F.R. § 73.3555, Note 2(k).

⁷³ An LMA or time brokerage agreement refers to "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." 47 C.F.R. § 73.3555, Note 2(j).

⁷⁴ A shared services agreement is an agreement to coordinate programming and/or operations between broadcast stations. See, e.g., *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Red 2718, 2731, ¶ 23 n.74 (2011).

⁷⁵ See generally 47 C.F.R. Part 73, Subpart E.

⁷⁶ 47 C.F.R. § 73.3555. While we collect data and information about the ownership of broadcast television stations for our Quadrennial Media Ownership review, the purpose of that review is different from our purpose here. In that context, we explore whether the current broadcast ownership rules promote the Commission's goals of competition, localism, and diversity in broadcasting. Here, we are specifically exploring how the structure of broadcast television affects competition in video programming distribution.

licenses for the use of any reallocated TV broadcast spectrum.⁷⁷ In the *14th Report*, we noted that these statutory and regulatory actions may affect the entry and rivalry of broadcasters.⁷⁸ We seek data, information, and comment on the impact of these requirements on entry and rivalry in the broadcast television industry. Are there other regulations that affect entry and rivalry of broadcast television stations? We ask commenters to provide data and examples for each regulation that affects entry and rivalry.

44. We seek information and comment on non-regulatory conditions affecting entry and rivalry, including access to capital and programming. For example, are there supply-side economies of scale that enable commonly owned broadcast television stations to spread fixed costs over greater audiences? Are there demand-side economies of scale that enable commonly owned broadcast television stations to negotiate lower prices for video programming? We invite analysis of the relationship between the advertising market and entry and exit in broadcast television. What other non-regulatory conditions influence entry and rivalry and to what extent? Which broadcast station licensees have entered or exited the broadcast television industry and why?

2. Broadcast Television Conduct

45. *Price Rivalry.* Because broadcast television stations do not charge consumers directly for the delivery of their signals, they do not compete on price in the traditional sense. Broadcast television is free to consumers who receive it over-the-air. Nevertheless, since about 90 percent of all television households receive broadcast stations from an MVPD, most consumers pay for broadcast stations as part of their MVPD service.⁷⁹ In the case of cable, broadcast television stations are part of the basic service package, which is generally a low price offering.⁸⁰ What price do MVPDs charge to consumers to receive broadcast television stations on their basic tier of service?

46. Commercial broadcast television stations earn revenue from advertising.⁸¹ We seek data, information, and comment on the business strategies of broadcast television stations as they confront changes in the advertising market, both long-term changes and those changes brought on by the economic downturn. In particular, we seek data on trends in prices for spot and local advertising on broadcast television stations. How does revenue from political advertising affect broadcasters' business strategies? To what extent has offering video content online increased the advertising revenue of broadcast stations?

47. Some commercial broadcast television stations also earn revenue in the form of retransmission consent fees from MVPDs in return for carriage of their stations.⁸² We seek information regarding the types and characteristics of stations seeking retransmission consent fees. We also request comment on the types and characteristics of stations choosing MVPD carriage under the must-carry regime. In addition, we request information regarding any business strategies aimed at increasing revenue

⁷⁷ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6401-05, 126 Stat. 156, 222-30 (2012).

⁷⁸ See *14th Report* ¶¶ 177-80.

⁷⁹ Nielsen, TELEVISION AUDIENCE 2010 & 2011, 2011, at 6. See also *14th Report*, Table 15.

⁸⁰ 47 U.S.C. §§ 534(b)(7); 543(b)(7), 47 C.F.R. § 76.901(a).

⁸¹ On-air advertising is the largest source of revenue for television stations even though the share of total revenue derived from on-air advertising is declining. Advertising represented 96 percent of the broadcast television station industry net revenues in 2006 and 91 percent of industry net revenues in 2010. See *14th Report* ¶ 216.

⁸² See *14th Report* ¶¶ 222-25 (indicating that broadcast stations, like cable networks, are negotiating per subscriber fees from MVPDs in exchange for carriage rights).

from retransmission consent fees. What prices (per subscriber) are broadcast stations receiving from MVPDs for retransmission consent?

48. *Non-Price Rivalry.* Broadcast stations compete with each other for viewers and advertisers on two major non-price criteria – programming and the ability to view such programming in multiple formats. As a result of the digital transition, each broadcast television station has been allotted 6 MHz of spectrum permitting multiple linear program streams, HD broadcasts, and/or the delivery of programming to mobile devices.⁸³ We seek data, information, and comment on the use of multiple program streams as a business strategy to enhance a broadcaster's competitive position in the delivery of video programming. What types of programming are broadcasters carrying on their multiple streams? Does the ability to offer multiple programming streams since the digital transition enhance the ability of broadcasters to attract viewers to over-the-air video service and to compete against MVPDs? We also seek data, information, and comment on the number of broadcast television channels available in each DMA, counting both primary stations and additional multicast programming streams. Has the amount of programming increased since the digital transition?

49. Are broadcasters using HD programming as a strategy to attract viewers? How many broadcast television stations offer video content in HD? What percentage of their programming is in HD? Has this percentage increased over time? What effect does the ability to offer video programming in HD have on broadcast stations' ability to compete against other broadcasters and attract viewers? Are broadcasters using their ability to deliver programming to mobile devices as a competitive strategy? How many broadcasters are currently delivering programming to mobile devices?⁸⁴ Do broadcasters have business plans to use some of their digital capacity for a subscription service or to lease a portion of their digital spectrum capacity to others for a subscription service?⁸⁵

50. Broadcasters remain important providers of local news.⁸⁶ We seek data and comment on the provision of local news as a competitive strategy in the delivery of video programming and the geographic availability of local news programming. We also request comment on the strategies and partnerships broadcasters are using to deliver news online. Does the ability to distribute programming online lead some broadcasters to increase their investment in news and information programming or provide news to consumers that might not otherwise be available?

51. For many years, broadcast television networks have used their local broadcast television affiliated stations as their primary distributor of programming. We solicit comment on whether and how broadcast television stations position themselves to remain the primary distributor of broadcast television

⁸³ *Id.* ¶ 157.

⁸⁴ *See id.* ¶¶ 203-05. *See also* Mobile Content Venture, <http://www.dyle.tv/mcv/overview/> (visited May 22, 2012); Mobile500 Alliance, <http://www.mobile500alliance.com/> (visited May 22, 2012).

⁸⁵ Previously, the Commission reported on U.S. Digital Television, Inc., which combined broadcast spectrum licensed to a number of broadcasters to create subscription video distribution via DTV streams. *13th Report*, 24 FCC Red at 598-99, ¶ 115.

⁸⁶ A 2011 survey found that local television remains the most popular source of news and information, but that local stations continue to face challenges in their attempts to grow online and mobile audiences. Deborah Potter et al., Pew Research Center's Project for Excellence in Journalism, *Local TV: Audience Rise After Years of Decline*, State of the News Media 2012, at <http://stateofthemediamedia.org/2012/local-tv-audience-rise-after-years-of-decline/> (visited May 22, 2012) ("Pew State of the News Media Report"). Local news also continues to be major policy goal of the Commission's media ownership rules. *See 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Proposed Rulemaking, 26 FCC Red 17489, 17492, ¶ 6 (2011).

network programming. To what extent is local broadcast programming available online, either on their own websites or through licensing agreements with OVD aggregators, such as Hulu and iTunes? What effect does the availability of broadcast programming online have on broadcast stations?⁸⁷ Are there benefits to broadcasters of making video content available online and on devices other than a television set? If so, what are those benefits?

52. Finally, what competitive strategies do broadcast television stations use to distinguish themselves from other broadcast television stations? For example, are broadcasters investing in local programming, other than news, to enhance the competitive position of their stations? We also seek data, information, and comment on the additional business strategies broadcast television stations use in competing against each other.

3. Broadcast Television Performance

53. We seek information and time-series data for the analysis of various performance metrics for broadcast television. These metrics include the improvements in quantity and quality of broadcast television station programming, over-the-air viewership, viewership from carriage on MVPDs, revenue from advertising, revenue from retransmission consent fees, other revenue, investment and innovation, and rate of return/profitability.

54. *Viewership.* We seek data, information, and comment on the viewership of broadcast television stations both from over-the-air reception and MVPD carriage. What is the trend in total viewership in total household terms? What is the trend in the share of the total audience that broadcast television stations receive either over-the-air or via MVPD carriage relative to the share received by cable networks carried by MVPDs? How many households view broadcast television stations online rather than over-the-air?

55. *Financial Performance.* We seek data on broadcast television station revenues, cash flows, and profit margins. We are interested in the performance of the broadcast television industry as a whole as well as the performance of broadcast television stations, on average.

56. In the *14th Report*, we provided information regarding the major sources of revenue for broadcast stations – advertising, network compensation, retransmission consent, and ancillary DTV revenues.⁸⁸ We seek data on each of these revenue sources. What percentage of total revenue is derived from each of these sources? How are these revenue sources and their relative shares of total revenue changing? Are there changes to the network/affiliate relationships that affect broadcast stations' revenues? We specifically seek information regarding the extent to which network affiliated broadcast stations now pay "reverse compensation" to their networks and/or share retransmission consent revenues with the network.⁸⁹ We realize that some broadcast stations are integrated with other businesses but we are primarily interested in financial data related directly to the video programming of broadcast television stations, such as the local and national advertising revenue, retransmission consent fees, and revenue from stations' websites.

57. We also seek data regarding the profitability of broadcast television stations. In the *14th Report*, we assessed profitability by examining both financial reports and data on a station-level and

⁸⁷ See *14th Report* ¶ 203.

⁸⁸ See *id.* ¶¶ 216-220 (advertising revenue); ¶ 221 (network compensation); ¶¶ 222-225 (retransmission consent fees); and ¶ 226 (ancillary DTV revenues).

⁸⁹ In the *14th Report*, we noted that broadcast networks have begun to require affiliates to make cash payments to them and/or require affiliates to share a portion of their retransmission consent revenues. See *id.* ¶¶ 221, 223.

company-level basis.⁹⁰ What metrics and data should we use in the 15th Report to measure profitability (e.g., return on invested capital and operating margins)? What are the major expenses for broadcast television stations? We are particularly interested in the impact of programming costs on broadcast television stations. Has the financial performance of broadcast stations improved given the broader distribution of broadcast stations' video programming through nonlinear formats, such as OVDs, VOD, and TV Everywhere services? Are there any other quantitative or qualitative metrics that would add to our analysis of broadcast television stations' financial performance?

58. *Investment and Innovation.* We seek comment on how investment in digital television affects competition among broadcast television stations and in the larger market for the delivery of video programming. We request data on broadcast television stations' investment in digital television and innovative technologies for distributing traditional programming, as well as on the financial returns of these investments. What has investment in digital television done to enhance the competitive position of broadcast television stations in the delivery of video programming? Are there geographic differences in the amount of investment?

C. Online Video Distributors

1. OVD Structure

59. OVDs are entities that distribute video content over the Internet to consumers.⁹¹ To receive video content distributed by an OVD, a consumer must subscribe to a high-speed Internet access service. The Commission already collects data on entities that provide fixed and mobile high-speed Internet access services. We therefore have significant information regarding the structure, conduct, and performance of the broadband markets, including the number and size of participants, the number of homes that have access to each provider's high-speed Internet service, the download and upload speeds, the services offered by broadband providers, and the prices charged for broadband service.⁹² With respect to the delivery of video content by OVDs, we seek comment on the best available sources of information to enable us to analyze OVDs.⁹³ The 14th Report surveyed some of the major players in the OVD marketplace, but lacked data and information covering the OVD industry as a whole. To the extent they are available, we ask commenters to provide data and information regarding the OVD marketplace for the 15th Report.

60. The OVD marketplace has grown substantially over the last few years. Today, OVDs include programmers and content producers/owners (e.g., broadcast and cable networks, sports leagues, and movie studios), video sharing sites and social network services (e.g., YouTube and Facebook), and affiliates of manufacturers, retailers, and other businesses (e.g., Amazon.com and Wal-Mart's Vudu service).⁹⁴ We request data, information, and comment on the number, size, and types of OVDs. Are

⁹⁰ *Id.* ¶ 230.

⁹¹ See *supra* note 10 (defining an OVD).

⁹² See FCC Form 477 Broadband Data; 15th Mobile Wireless Report; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Amended by the Broadband Data Improvement Act, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008 (2011). See also Form 477 Modernization NPRM.

⁹³ See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Rcd 14091, 14112, ¶ 52 (2011).

⁹⁴ 14th Report ¶¶ 244-57. See also Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17978, ¶ 132 n.421 (2010).

OVDs typically affiliated with other businesses or are they stand-alone entities? To what extent do individual OVDs compete with other OVDs? What data sources are available to analyze the structure of the OVD marketplace? What entities do OVDs view as direct competitors? For instance, do OVDs compete with MVPDs and/or broadcast television stations? Is OVD service a substitute or complement for MVPD service? What data are available and what metrics should we use to analyze the extent to which OVDs' services are a substitute or complement to MVPD service?

61. We request input about issues relating to horizontal concentration and vertical integration in the OVD marketplace. In the *14th Report*, we noted that it is difficult to measure horizontal concentration in the OVDs market due to continual entry and exit of industry participants, inability to access necessary data, and lack of established metrics to measure OVD performance. Are there any new data sources available that would help the Commission undertake a horizontal concentration analysis in the *15th Report*? What methodologies might the Commission employ? What metrics could the Commission use?

62. We also seek comment and data that would permit us to assess vertical integration in the OVD marketplace. We note that many OVDs are vertically integrated with other businesses.⁹⁵ How do these relationships affect competition in OVD marketplace? For example, do affiliations between OVDs and content owners impact the availability of specific online content via multiple OVDs? Do affiliations between OVDs and equipment retailers and/or manufacturers have an impact on the ability of consumers to access OVD content via multiple devices, including mobile devices?

63. We further request comment on conditions that affect entry into the OVD marketplace and rivalry among OVDs. What legal and regulatory barriers to entry do OVDs face? What non-regulatory barriers exist? For example, OVDs often depend on unaffiliated ISPs to deliver content to their customers. What affect does the need to rely on third parties to deliver their video content to consumers have on the ability of entities to enter and compete in the OVD marketplace? What percentage of a typical ISP's traffic is due to OVD content? Do difficulties in acquiring content rights, or the costs of acquiring such rights, act as a significant barrier to entry? Does the increasing cost of programming content have the potential to drive OVDs out of business? What other non-regulatory barriers to entry are there? What are the trends in recent OVD entry or exit, and what specific factors contribute to OVD entry or exit?

2. OVD Conduct

64. What business models and competitive strategies do OVDs use to compete in the delivery of video content? What are the key differences among the business models and strategies in terms of services offered to consumers? Some OVDs provide content to users for free, while others charge users a fee to access content. Some OVDs charge a monthly fee, while others charge separately for each television program or movie. We seek comment on the factors that affect an OVDs choice of business models. Are OVDs increasingly inclined to charge consumers for access to their content? To what extent do OVDs rely on advertising, subscription fees, per-program fees, or other sources of revenue? Are OVDs implementing additional revenue strategies? We also seek information on the prices OVDs charge for access to video content over the Internet. What prices are consumers currently paying for OVD service? Have these prices changed over the last few years, and if so, why? In addition, we request information on whether OVDs are implementing business models that are not free, subscription, or

⁹⁵ For example, Hulu is an OVD owned by News Corporation, NBCUniversal, The Walt Disney Company, and Providence Equity Partners. The four largest professional sports leagues -- Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League -- also provide a significant portion of their programming online through paid subscription services. See *14th Report* ¶¶ 246-47.

transaction based. For example, to what extent are OVDs entering partnerships with MVPDs or other entities to provide bundled, exclusive, or otherwise enhanced access to the OVD service for subscribers of MVPDs or other entities?

65. In the last few years, OVDs have made an increasing amount of video content available to consumers over the Internet. What are the types of business arrangements OVDs use to acquire distribution rights for content? What strategies are OVDs implementing to obtain video content for their libraries? How does the decision to charge customers affect an OVD's ability to deliver additional content to consumers? To what extent are producers and owners of highly desirable content willing to make that content available to consumers online? What other factors have an impact on the ability of OVDs to secure the rights to compelling content?

66. OVDs increasingly make their video content available to subscribers via multiple devices, including mobile devices such as smartphones and tablets.⁶⁶ To what extent must OVDs make content available via multiple devices, including mobile devices, in order to compete in the OVD marketplace? What costs or difficulties do OVDs face when attempting to make content available via multiple devices?

67. How is OVD service advertised? What media do OVDs use to advertise their service? Do OVDs highlight the availability of increasing amounts of online video content to attract more viewers and/or subscribers? Do OVDs use the ability to access content via multiple devices, including mobile devices, as a means to attract and retain subscribers? What other factors do OVDs stress in advertisements?

68. Currently, most OVD services allow viewers to search for content (e.g., video clips, episodes of TV shows, or movies) within the OVD's library and to view such content whenever the customer wishes.⁶⁷ To what extent have OVDs begun to produce or acquire original content? What are the costs of producing or acquiring such content and does such content attract additional viewers? Are those OVDs offering original content more competitive with MVPDs and broadcasters? Are OVDs providing live and local content as a means to attract viewers (e.g., local news and sporting events)? What additional strategies are OVDs using to differentiate themselves from competitors? To what extent do OVDs provide data on content availability to third parties for inclusion in their content directories?

3. OVD Performance

69. We seek input concerning OVD viewership, revenue, investment, and profitability. In order to measure viewership, we seek information concerning the type of video content available online, particularly television programs, movies, and sports, as well as the extent to which consumers are viewing such content. How many consumers viewed content online as of June 30, 2011 and June 30, 2012? We also seek other metrics that might be used to measure OVD viewership, such as hits/views, subscribership numbers, and consumer purchase transactions. Have these numbers increased over the last few years, and if so, why? Has the entry of OVDs in the marketplace resulted in reduced viewership of video programming from MVPDs and broadcast television stations? What metrics should we use to compare OVD viewership, MVPD viewership, and broadcast television station viewership? How have the windowing strategies⁶⁸ of video content aggregators and creators impacted OVDs? How have OVDs increased the quantity and improved the delivery of their video content since the *14th Report*? Is the OVD

⁶⁶ *14th Report* ¶ 237.

⁶⁷ *Id.* ¶¶ 244-57.

⁶⁸ See *infra* ¶ 76 & note 111.

market affected by the ability of MVPDs to increase their capacity to offer video content using digital and IP-based technologies?

70. The 14th Report identified several possible revenue sources for OVDs, including fees from consumers; in-video advertising; display advertising around the video; product placement; and advergaming.⁹⁹ We seek updated revenue data for these sources, as well as any other revenue sources available to OVDs. What revenue sources are the most lucrative for OVDs?

71. We also request information and comment on investments and innovations in the OVD marketplace. What types of entities are investing in new and existing OVDs? What financial returns do OVDs earn on their investments? What types of investments are OVDs making to enhance their growth? Are OVDs increasingly entering into joint ventures or partnerships to increase investment opportunities? What innovative services or technologies are OVDs currently deploying? How should we measure profitability for OVDs given that many operate within multimedia conglomerates or other large, diversified businesses? Are there additional performance metrics we should consider for OVDs? We seek comment on suggested ways to measure OVD performance and relevant data that will allow us to perform such analysis.

III. RURAL VERSUS URBAN COMPARISON

72. Section 628(a) of the Communications Act sets as a goal increasing the availability of video programming to persons in rural and underserved areas.¹⁰⁰ As in previous reports, we expect to compare competition in the market for the delivery of video in rural markets with that in urban markets.¹⁰¹ The Communications Act does not include a definition of what constitutes a rural area, and the Commission has used various proxies to define rural areas, including Economic Area ("EA") Nodal versus Non-nodal counties¹⁰² and Metropolitan Statistical Area ("MSA") counties versus Rural Service Areas ("RSA") counties.¹⁰³ In the 14th Report, the Commission opted to use its definition of the term "rural," which it defines as a county with a population density of 100 persons or fewer per square mile.¹⁰⁴ Is this a satisfactory definition for the purpose of measuring the availability of and competition among providers of video programming? Are there other alternatives we should consider based on zip codes,

⁹⁹ See 14th Report ¶¶ 327-33. Avergaming, a type of niche marketing, is the practice of inserting paid advertisements in a video game.

¹⁰⁰ 47 U.S.C. § 548(a). (g).

¹⁰¹ See, e.g., 14th Report ¶¶ 343-58; 13th Report, 24 FCC Red at 579-580, ¶¶ 72-73.

¹⁰² Economic Areas are defined by the Department of Commerce's Bureau of Economic Analysis, and consist of one or more counties that are "Economic Nodes" and the surrounding commercially related counties. As a proxy for urban and rural geographic areas, the Commission compared counties that made up economic nodes, i.e., nodal counties, with those that do not make up economic nodes, i.e., non-nodal counties. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act – Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Red 14783, 14835-36, ¶ 112 (2003) ("Eighth Wireless Competition Report"). See also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act – Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Red 12985, 13022 (2002) ("Seventh Wireless Competition Report").

¹⁰³ For administrative convenience, the Commission defined markets for the licensing of cellular systems in terms of Metropolitan Statistical Areas (MSAs) and Rural Service Areas ("RSAs"). MSAs are 306 areas defined by the Office of Management and Budget, as modified by the Commission. RSAs are 428 areas, other than MSAs, established by the Commission. 47 C.F.R. § 22.909. See also *Eighth Wireless Competition Report*, 18 FCC Red at 14836, ¶ 113; *Seventh Wireless Competition Report*, 17 FCC Red at 13022.

¹⁰⁴ 14th Report ¶ 344.

census tracts, or some other geographic unit to compare competition among video programming distributors in rural and urban areas?¹⁰⁵

73. We seek data, information, and comment to assess whether there are differences in the delivery of video programming between rural and urban areas, and the factors that account for any differences. Are there differences between the quantity and types of video programming offered to rural consumers versus urban consumers? How does competition between MVPDs, broadcast stations, and OVDs differ in rural and urban areas? Are there demographic, geographic, and economic factors driving competitive differences in rural and urban markets? Which, if any, delivered video programming services are most often lacking in rural areas? We recognize that most homes have access to two DBS services – DIRECTV and DISH Network – that provide national service. How many homes in rural and urban areas lack access to a cable system or another wireline MVPD? Is the percentage of these homes greater in rural areas? How does access to broadcast television stations differ between rural and urban areas? Are there any distinctions between rural and urban areas in the reliance of over-the-air broadcast signals? Do rural areas have less access to high-speed Internet service and, therefore, less access to OVD services relative to urban areas? How has the growth of online video increased the buildout of broadband in rural areas?

74. We also request information, data, and comment regarding the differences in the prices of delivered video service in rural areas relative to urban areas. Are MVPDs operating in rural areas charged similar rates for content as MVPDs in urban areas? How do the retransmission rates in rural areas compare to those in urban areas? When MVPD service is available in rural areas, are prices higher or quality lower relative to urban markets?¹⁰⁶ Are there examples of rural areas that receive delivered video programming service similar in price and quality to those found in urban areas?

IV. KEY INDUSTRY INPUTS

A. Video Content Creators and Aggregators

75. Creators of video programming are major production studios and independent production companies.¹⁰⁷ Video content aggregators are entities that combine video content into packages of video programming for distribution.¹⁰⁸ Video content aggregators include broadcast networks (e.g., ABC), cable networks (e.g., ABC Family), and broadcast stations (e.g., WJLA-TV, Washington, DC). Many of the large entertainment conglomerates include subsidiaries that are both video content creators and aggregators.¹⁰⁹ We request data, information, and comment that will help us analyze the number and size

¹⁰⁵ See *supra* Section II.A.1. For example, USDA's Economic Research Service Rural-Urban Commuting Area ("RUCA") codes use census tracts rather than counties. See Rural Health Research Center, Rural-Urban Commuting Codes, <http://depts.washington.edu/uwrUCA/> (visited May 22, 2012).

¹⁰⁶ The Cable Price Survey Report provides information about national cable rates, but does not provide a comparison of rates in urban versus rural areas.

¹⁰⁷ Large firms that create content include Disney, News Corp., NBC Universal, Time Warner Inc., CBS, Viacom and Discovery. See *14th Report* ¶ 360. In addition to creating television content, many of these companies produce theatrical movies and retain ultimate distribution rights. *Id.* Independent content creators include companies, such as The Weinstein Company, the producer of movies such as *The Artist* and *The King's Speech*. See The Weinstein Company, *About Us*, <http://weinsteinco.com/about-us/> (visited May 22, 2012).

¹⁰⁸ We note that some OVDs distribute video programming aggregated by other entities and that some OVDs aggregate the programming they distribute.

¹⁰⁹ *14th Report* ¶ 360. For example, Disney and its affiliated companies include movie and television production studios, as well as the ABC television network and several cable networks, including ESPN and ABC Family. The
(continued....)

of content creators and aggregators and the relationships between the content creators and aggregators and the firms that distribute video content. Do independent production entities face any barriers in obtaining carriage on all or some delivery systems (including broadcast, MVPDs, and OVDs)? In addition, we are interested in information regarding entities, local and national, creating news, public interest programming and/or sports and the relationships between the content creators and those that deliver video programming.¹¹⁰ We are also interested in trends in vertical integration among studios and networks. What effect, if any, does vertical integration have on their willingness and ability to make programming available to MVPDs, broadcast television stations, or OVDs on a linear and nonlinear basis? Are there any differences for MVPDs, broadcasters, or OVDs with respect to their relationships with independent content creators in comparison to vertically integrated content creators? If so, what is the impact of these differences?

76. We also seek data, information, and comment on the business strategies of content creators and aggregators regarding the selling and licensing of video content and the effect on video distribution. In recent years, some content owners have altered their business strategies with respect to the type of video content created, the timing of release of specific video content through the various delivery windows ("windowing"),¹¹¹ and the prices charged for content in each window. How have these changes affected competition between distributors of video programming or the growth of OVDs? Have there been significant changes in the bargaining power between content owners and distributors of video programming since the *14th Report*? How have changes in content creation altered investment in the distribution of video programming? How do the windowing strategies of video content owners affect the distribution of video programming through VOD and over the Internet? How do the business models of OVDs (i.e., electronic sell-through,¹¹² advertising-supported, and/or subscription-based models) alter the windowing strategies of content aggregators and creators? Have business strategies changed for creators of news programming, especially local news programming? Do the delivery strategies for the creators of sports programming differ from other video content creators? Have the business strategies of sports leagues evolved and, if so, how? Has the entry or growth of new video content aggregators lead to an expanded number of MVPD channel offerings or additional programming on broadcast television stations using multiple digital streams? Are new entrants or established video content aggregators driving the creation of additional programming networks and/or packages?

B. Consumer Premises Equipment

77. Consumer premises equipment traditionally refers to devices that enable consumers to watch video content from MVPDs and broadcast stations on televisions. Such devices include

(...continued from previous page)

Walt Disney Company, *Corporate Information: Company Overview*, <http://corporate.disney.go.com/corporate/overview.html> (visited May 22, 2012).

¹¹⁰ We note that a significant portion of news programming is produced at the local and regional level and, with respect to sports, each league negotiates rights differently. We also recognize that sports programming differs from other television programming because audience and advertiser interest is more predictable, and live sports programming has little value beyond the initial telecast. These factors, among others, have led to the rising cost of sports programming. See *14th Report* ¶¶ 198, 372-75. See also *supra* note 86.

¹¹¹ In addition to distributing movies in theaters, producers sell rights to distribute them on DVDs, on demand, pay television services (e.g., HBO and Showtime), broadcast networks, and cable television networks. Likewise, television production companies have traditionally adhered to prescribed time gaps between the initial broadcast and cable distribution of a program series, DVDs, and syndication. *14th Report* ¶¶ 365, 368, 370.

¹¹² Electronic sell-through is the business model where a consumer pays a one-time fee to download a television show, movie, or other media to be stored locally on a hard drive. *14th Report* ¶ 290.

televisions, antennas, cable and satellite set-top boxes, DVD players, and recording equipment (e.g., DVRs). Today, however, consumer premises equipment also includes devices (e.g., video game consoles and media streaming devices) that permit video content delivered by MVPDs and OVDs to be viewed on a television, as well as allow video content delivered by broadcast television stations and MVPDs to be viewed on personal computers or mobile devices.

78. Recently, the term “consumer premises equipment” has come to include devices, such as “connected-TVs,” that receive video content directly from the Internet.¹¹³ Similarly, in addition to enabling users to watch videos on computers, several set-top boxes (e.g., Roku, Boxee, and Apple TV) deliver online video directly to viewers’ televisions.¹¹⁴ With connected-TVs, game consoles (e.g., Microsoft’s Xbox¹¹⁵ and Sony’s PlayStation), or Blu-Ray players, consumers can also watch certain television programs, movies, and sporting events online.¹¹⁶ DVR manufacturer TiVo enables consumers to purchase movies and television programs from online stores, stream movies and content from subscription services like Hulu Plus and Netflix, and, in certain areas, access cable-provided video-on-demand.¹¹⁷ Likewise, mobile devices, such as Apple’s iPad, enable consumers to watch some television programs and movies using broadband wireless connections. These and other devices allow consumers to purchase and download online video content.

79. In the 15th Report, we plan to discuss the devices that facilitate the delivery of video programming and their effect on competition in the delivery of video programming.¹¹⁸ We recognize the costs of consumer premises equipment may hinder competition by, among other things, raising consumers’ switching costs. We therefore request information on developments relating to consumer premises equipment and the services providing options to consumers for viewing video programming. In particular, we seek information on the retail market for set-top boxes, including set-top boxes that do not use CableCARDS, such as those sold at retail for use with DBS services or for use with OVD services. What are the challenges that manufacturers face in investing and innovating in consumer equipment? What are the different types of consumer premises equipment – both MVPD supplied and non-MVPD supplied – used to access video content and the capabilities thereof? What prices do MVPDs typically pay for those devices? To what extent do MVPDs offer different equipment options at different price points on their systems, and what is the overall lease cost of such equipment to subscribers?¹¹⁹ To the extent that consumers can purchase comparable devices, what price would a consumer pay for such a device?

¹¹³ See *id.* ¶ 399.

¹¹⁴ See *id.*

¹¹⁵ See Frank X. Shaw, *Xbox: Now That’s Entertainment*, THE OFFICIAL MICROSOFT® BLOG, May 31, 2011, at http://blogs.technet.com/b/microsoft_blog/archive/2011/05/31/xbox-now-that-s-entertainment.aspx (visited May 22, 2012) (“Xbox is the gateway to games, music, movies and TV shows – in short, it is central to entertainment.”).

¹¹⁶ See John P. Falcone, *Which streaming media device is right for you?*, CNET NEWS, Mar. 26, 2012, at http://news.cnet.com/8301-17938_105-20025670-1/which-streaming-media-device-is-right-for-you/ (visited May 22, 2012).

¹¹⁷ Harry McCracken, *TiVo Gets Comcast’s Xfinity on Demand*, TIME, Apr. 9, 2012, at <http://techland.time.com/2012/04/09/tivo-gets-comcasts-xfinity-on-demand/> (visited May 22, 2012).

¹¹⁸ 47 U.S.C. § 549(a). See also 14th Report ¶ 393.

¹¹⁹ We understand that set-top box functionalities can vary widely. We invite comment on the functions and services that MVPDs use to differentiate the prices that they charge to consumers.

80. We also seek information and comment on how competition among MVPDs affects the deployment of new CPE and delivery technologies to improve the subscriber experience, such as through improved search and navigation capabilities. In particular, we seek information on the extent to which MVPDs are using managed IP clouds to deliver network-based DVRs, interactive programming guides, IP video streaming, VOD and other interactive applications. In addition, we request information regarding the impact of digital rights management technology and conditional access technology (and associated patent or content licensing terms) on the availability of video programming to consumers. What are the adoption trends among consumers for these types of equipment? To what extent are CPE manufacturers partnering with OVDs, MVPDs, content aggregators, and content creators to offer linear or non-linear video programming to consumer devices?

81. We understand that there are certain things MVPDs must coordinate with electronics manufacturers (e.g., DRM,¹²⁰ codecs,¹²¹ and connectors¹²²) in order to deliver video programming to consumers. We seek comment on other technical specifications that MVPDs, content owners, and consumer electronics manufacturers coordinate. How do these parties agree on the devices that are used? How much interaction is there between MVPDs delivering video programming and manufacturers of consumer premises equipment, especially manufacturers of cable and DBS set-top boxes and devices enabling consumers to view online video on their televisions?

V. CONSUMER BEHAVIOR

82. We seek information about how trends in consumer behavior affect the products and services of providers of delivered video programming. For instance, we seek data on trends that compare consumer viewing of regularly scheduled video programming with viewing of time-shifted programming using DVRs, VOD content, and OVD content. Video content available online is increasing,¹²³ and reports indicate that an increasing number of consumers are viewing videos online.¹²⁴ To what extent are consumers becoming “cord avoiders”¹²⁵ and dropping MVPD service in favor of OVDs or a combination of OVDs and over-the-air television? Are consumers reducing their MVPD subscriptions by, for example, substituting Netflix for premium channels or VOD services? Do consumers view OVD services

¹²⁰ Digital Rights Management (“DRM”) systems encrypt content with software before delivering it down to an authorized consumer’s device for descrambling. See Mike Robuck, *The Fragmented World of DRM*, CED MAGAZINE, Mar. 2, 2012, at <http://www.cedmagazine.com/articles/2012/03/the-fragmented-world-of-drm> (visited May 22, 2012).

¹²¹ Codec is short for coder-decoder or compressor-decompressor. Codecs are software that take digital media data and either compress them (for transport and storage) or decompress them (for viewing or transcoding). With smaller file sizes and lower bit rates, digital media content can be streamed over a network more quickly and easily. See Loyd Chase, *All About Video Codecs and Containers*, PCWORLD, Dec. 14, 2010, at http://www.pcmag.com/article/213612/all_about_video_codecs_and_containers (visited May 22, 2012).

¹²² Connectors are the part of a cable that plugs into a port or interface to link networks or devices together. Connectors attach to set top boxes, televisions, computers, etc. See HDTV Magazine, *Set Top Box Interconnections*, <http://www.hdtvprimer.com/ISSUES/STBs.html> (visited May 22, 2012).

¹²³ *14th Report* ¶ 242.

¹²⁴ See *id.* ¶¶ 319-24 & Table 23.

¹²⁵ The term “cord-avoiders” refers to individuals or households using OVD alternatives (such as Hulu and Netflix) to avoid paying for MVPD service. In some cases the choice to do so is related to recent economic difficulties. See Dan Hirschhorn, *‘Cord-Avoiders’ to Reduce Cable and Satellite TV Rolls in 2012, Analysts Say*, ADVERTISING AGE, Nov. 28, 2011, at <http://adage.com/article/mediaworks/cable-satellite-tv-subscriber-rolls-shrink-2012/231216/> (visited May 22, 2012).

separately or in conjunction with over-the-air broadcast television service as a potential substitute for MVPD service? What impact do “cord-nevers”¹²⁶ have on the market for delivered video programming?

83. Video distributors advertise their services on television, in newspapers, and through mailings, as well as offer Internet sites where potential consumers can find information about services, equipment, prices, and the cost of installation. We seek data, information, and comment on the consumer information sources for delivered video programming services and equipment. Do consumers have sufficient information to compare the prices, services, and equipment that video distributors offer? What do consumers consider most important when choosing a provider? What do consumers say are the main reasons for switching providers (e.g., price, program packages, and customer service)?

VI. PROCEDURAL MATTERS

84. *Authority.* This *Notice* is issued pursuant to authority contained in Sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 403, and 548(g).

85. *Ex Parte Rules.* There are no *ex parte* or disclosure requirements applicable to this proceeding pursuant to 47 C.F.R. § 1.1204(b)(1).

86. *Comment Information.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). All filings concerning matters referenced in this Public Notice should refer to MB Docket No. 12-203.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

¹²⁶ The term “cord-nevers” refers to individuals who have never subscribed to an MVPD service. They are typically young adults and students. See Bernard Gershon, *TV’s Scariest Generation: The Cable Nevers*, ADVERTISING AGE, Dec. 2, 2011, at <http://adage.com/article/digitalnext-tv-s-scariest-generation-cable-nevers/231330/> (visited May 22, 2012).

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

87. *Accessibility Information.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

88. For further information about this Notice of Inquiry, please contact Johanna Thomas at (202) 418-7551, johanna.thomas@fcc.gov, or Marcia Glauber at (202) 418-7046, marcia.glauber@fcc.gov.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 12-203

I would like to thank the Media Bureau staff for all of their work producing this comprehensive report, which demonstrates in detail that the video marketplace is more competitive than it ever has been. Over the four years covered by the report, the range of MVPD options expanded, broadcasters increased their number of multicast streams, distribution of video content over the Internet exploded, and the variety of devices capable of displaying video programming grew dramatically. This is all good news, because competition within and among market segments (broadcasters, MVPDs, and online video distributors) benefits consumers.

Given the fast pace of change within the industry, it is vital that the Commission comply with its statutory mandate to “annually report to Congress on the status of competition in the market for the delivery of video programming.” 47 U.S.C. § 548(g). Our record on this score is a matter of public record and need not be repeated here. I am hopeful, however, that we are back on track and that we will release our next report in 2013.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of Competition in) MB Docket No. 07-269
the Market for the Delivery of Video Programming)

FOURTEENTH REPORT

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I. EXECUTIVE SUMMARY

1. This is the fourteenth report (“14th Report” or “Report”) submitted by the Federal Communications Commission to the United States Congress on the status of competition in the market for the delivery of video programming as required by Section 628(g) of the Communications Act of 1934, as amended (the “Act”).¹ In this Report, we focus on developments in the video marketplace in 2007, 2008, 2009, and 2010.² As described below, the most significant trends since the last report relate to the increased deployment of digital technology, consumers’ rising demands for access to video programming anywhere and anytime, and the evolution of online video from a niche service into a thriving industry.

2. For the first time, we present information and data under a new analytical framework, which is consistent with the framework we have used in the recent wireless and satellite competition reports.³ For this Report, we categorize entities into one of three strategic groups – multichannel video programming distributors (“MVPDs”),⁴ broadcast television stations,⁵ and online video distributors

¹ 47 U.S.C. § 548(g).

² While we focus on these four years, in many instances we find it useful also to recognize some more recent developments based on data that we have collected from third-party sources. *See infra*, ¶ 17.

³ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, 25 FCC Rcd 11407 (2010) (“14th Mobile Wireless Report”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664 (2011) (“15th Mobile Wireless Report”); *Third Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, IB Docket Nos. 09-16 and 10-99, 26 FCC Rcd 17284 (2011) (“Third Satellite Competition Report”).

⁴ For purposes of this report, MVPDs are companies that offer multiple channels of video programming to consumers for a subscription fee. The term “MVPD” is defined more fully below in Sec. III.A.1.

⁵ We consider broadcast television stations separately for the 14th Report, as we have done in previous reports. Although broadcasters have transitioned to digital transmission and have the capability to offer additional linear channels, they still offer far fewer programs than are available from MVPDs and do not provide a subscription service. The Commission has previously held that broadcast television alone is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market. Accordingly, we treat broadcasters as part of a separate group. *See* 47 U.S.C. § 521(1); S. REP. NO. 102-92, at 8-12 (1991). *See also General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee for Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 509, ¶ 75 (2004) (citing *Competition, Rate Deregulation, and the Commission’s Policies Relating to the Provision of Cable Television Services*, MM Docket No. 89-600, Report, 5 FCC Rcd 4962, 5003, ¶ 69 (1990)); *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications* (continued....)

("OVDs").⁶ For each of these categories we examine industry structure, conduct, and performance. The following is an overview of our findings.

3. *MVPDs.* Cable MVPDs accounted for almost 60 percent of all MVPD subscribers at the end of 2010. This represents a decline in cable's share of the MVPD group since the last report. In 2006, cable MVPDs accounted for over 65 percent of all MVPD subscribers. Although the number of cable video subscribers has been falling, cable MVPDs have done well financially by increasing sales of advanced services (e.g., digital cable, Internet access, and telephone) to the remaining customers.

4. The two DBS MVPDs, DIRECTV and DISH Network, accounted for over 33 percent of MVPD subscribers in 2010. This represents an increase in DBS's share of the MVPD group since 2006 when DBS MVPDs accounted for just over 29 percent of MVPD subscribers.

5. In the MVPD group, the most significant change in the status of competition has been the entry of AT&T and Verizon. These two telephone companies have upgraded their networks to provide video services that compete directly with cable and DBS. At the end of 2010, the video services of Verizon FiOS and AT&T U-verse were available to one-third of U.S. homes and accounted for approximately seven percent of all MVPD subscribers. In 2006, Verizon's service was available to approximately three percent of all U.S. households.⁷

6. Another significant development within the MVPD category has been the "TV Everywhere" initiative,⁸ which allows subscribers of certain MVPD services to access MVPD video programming on stationary and mobile Internet-connected devices including: televisions, computers, tablets, and smartphones.

7. *Broadcast Television Stations.* Since the last report, full-power television stations completed their transition from analog to digital service. Digital broadcasting gives broadcast stations greater flexibility, allowing them to offer high definition ("HD") programming, multiple streams of programming of standard definition ("SD") programming, and/or programming delivered to mobile

(Continued from previous page)

Corporation (Transferee), CS Docket No. 01-348, Hearing Designation Order, 17 FCC Red 20559, 20607-09, ¶¶ 109-115 (2002) ("EchoStar-DIRECTV HDO").

⁶ An "OVD" is any entity that offers video content by means of the Internet or other Internet Protocol (IP)-based transmission path provided by a person or entity other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering online video content as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint. See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Red 4238, 4357, App. A (2011) ("Comcast-NBCU Order"). Consumers need a broadband connection to receive video content from OVDs. The issue of whether a certain type of OVD also qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *UDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); and *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, CSR-8605-P (Mar. 24, 2010). Nothing in this Report should be read to state or imply our determination on that issue. The Media Bureau though is currently seeking comment on the interpretation of the terms "MVPD" and "channel." See *Media Bureau Seeks Comment On Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Red 3079 (MB 2012).

⁷ AT&T began its U-verse service in late 2006 and did not report data for that year.

⁸ "TV Everywhere" refers to an MVPD initiative, which allows subscribers of certain services to access video programming on stationary and mobile Internet-connected devices, including television sets, computers, tablets, and smartphones. MVPDs market their TV Everywhere initiatives under a variety of brand names (e.g., Verizon's FlexView). See also *infra*, nn. 30 & 31.

devices. With multicasting,⁹ stations can cater to niche audiences with programming from newer networks or can affiliate their multicast streams with established networks to give viewers in smaller markets more over-the-air viewing options.

8. Several major patterns of consumer behavior have emerged which impact broadcast stations. The first is the dramatic increase in the number of households with HD television sets, from 25 percent during the 2007-2008 television seasons to 64 percent during the 2010-2011 television season. The second is the doubling of penetration of digital video recorders (DVRs), from 19 percent during the 2007-2008 television season to 38 percent during the 2010-2011 television season. The availability of DVRs and of broadband and mobile devices has spurred consumers' desire to watch video on a time-shifted basis either on television sets or on other screens. In recent years, broadcast networks have started to explore and develop a variety of alternative outlets and business models for the distribution of their programming, including video-on-demand ("VOD"), online video distribution, and electronic sell-through.¹⁰

9. *OVDs*. Since the last report, OVDs have emerged as significant providers of video content. The OVD marketplace has expanded considerably, with all of the major providers either entering the market over the last few years or dramatically retooling their approach during that time. Today's growing list of OVD providers includes programmers, content owners/producers, and affiliates of online services, manufacturers, retailers, and other businesses.

10. Providers have continued to develop business models for the provision of OVD services. Current business models, which providers often use in combination, include free (often ad supported), subscription, pay-per-program (rental), and electronic sell-through.

11. The amount of professionally produced content available online has expanded considerably since the last report. Today, online viewers can watch television shows (including recently aired episodes); newly released and older movies; sporting events; and other content, including high-quality content produced specifically for online distribution. Online video, like the Internet itself, has migrated beyond the computer to a wide variety of devices since the last report. Consumers now can access OVD service via computers, smartphones, tablets, gaming consoles, smart television sets, Blu-ray players, and a host of consumer electronics products.

II. INTRODUCTION

A. Scope of the Report

12. Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")¹¹ amended the Act and established regulations for the purpose of increasing competition and diversity in multichannel video programming distribution, increasing the availability of satellite delivered programming, and spurring the development of communications technologies.¹² To

⁹ See *infra*, n. 541.

¹⁰ See *infra*, ¶ 290 & n. 929.

¹¹ 1992 Cable Act, Pub. L. No. 102-385, § 19, 106 Stat 1460, 1494 (1992) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.").

¹² Video programming is defined as: "Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use." 47 U.S.C. § 522(20); 47 C.F.R. § 79.1(a)(1).

measure progress toward these goals. Congress required the Commission to report annually on “the status of competition in the market for the delivery of video programming.”¹³

13. In 2009, the Commission solicited 2007, 2008, and 2009 data, information, and comment for the period 2007, 2008, and 2009 similar to what the Commission requested for previous reports.¹⁴ Thereafter, the Commission initiated a comprehensive review of the way in which it uses data, including data used for its statutory competition reports.¹⁵ In the course of that review, the Commission determined that the data submitted in response to the 2009 notices of inquiry should be supplemented. Thus, on April 21, 2011, the Commission released a *Further Notice of Inquiry*, requesting additional data for 2009, seeking data for 2010, and encouraging the submission of comparable historical data for 2007 and 2008.¹⁶

14. To present the most useful information concerning competition in the video programming market, this report alters the analytic framework of earlier reports.¹⁷ Importantly, this new framework will also allow the Commission to present competitive data in a uniform manner that is consistent in format with the other Commission competition reports.¹⁸

¹³ See Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 548(g). The Commission’s previous reports appear at: *Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Red 7442 (1994) (“*First Report*”); 11 FCC Red 2060 (1995) (“*Second Report*”); 12 FCC Red 4358 (1997) (“*Third Report*”); 13 FCC Red 1034 (1998) (“*Fourth Report*”); 13 FCC Red 24284 (1998) (“*Fifth Report*”); 15 FCC Red 978 (2000) (“*Sixth Report*”); 16 FCC Red 6005 (2001) (“*Seventh Report*”); 17 FCC Red 1244 (2002) (“*Eighth Report*”); 17 FCC Red 26901 (2002) (“*Ninth Report*”); 19 FCC Red 1606 (2004) (“*Tenth Report*”); 20 FCC Red 2755 (2005) (“*11th Report*”); 21 FCC Red 2503 (2006) (“*12th Report*”); and 24 FCC Red 542 (2009) (“*13th Report*”).

¹⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Red 750 (2009) (“*Notice of Inquiry*”) (requesting data as of June 2007). The Commission subsequently adopted a Supplemental Notice of Inquiry requesting data as of June 2008 and June 2009. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, 24 FCC Red 4401 (2009) (“*Supplemental Notice of Inquiry*”). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Order, 24 FCC Red 2524 (2009) (announcing, *inter alia*, that the Commission would issue a single report for 2007, 2008, and 2009 to bring its reporting up to date).

¹⁵ See *FCC Launches Data Innovation Initiative* (news release), June 29, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299269A1.pdf. The Data Innovation Initiative was launched to modernize and streamline how the FCC collects, uses, and disseminates data. As part of the Data Innovation Initiative, the Commission’s Wireline, Wireless, and Media Bureaus released public notices seeking input on what current data collections should be eliminated, what new ones should be added, and how existing collections can be improved. See, e.g., *Pleading Cycle Established for Comments on Review of Media Bureau Data Practices*, MB Docket No. 10-103, Public Notice, 25 FCC Red 8236 (2010). The public notices grew out of an FCC-wide review of FCC systems and processes for data collection, analysis and dissemination led by the Office of Strategic Planning and Policy Analysis. See *FCC Agency Reform*, presentation before the Commission (Aug. 27, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293108A1.pdf; *FCC Advances Data Innovation Initiative* (news release), Feb. 8, 2011, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304518A1.pdf.

¹⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Red 14091 (2011) (“*Further Notice*”).

¹⁷ See *id.* at 14094-96, ¶¶ 4-5.

¹⁸ See 14th *Mobile Wireless Report*; 15th *Mobile Wireless Report*; *Third Satellite Competition Report*, *supra*, n. 3.

B. Analytic Framework

15. Under our new analytic framework, we first categorize entities that deliver video programming into one of three groups:¹⁹ MVPDs, broadcast television stations, and OVDs. This is the first time that the Commission has considered OVDs separately in its analysis.²⁰ Second, we examine industry structure, conduct, and performance, considering factors such as:

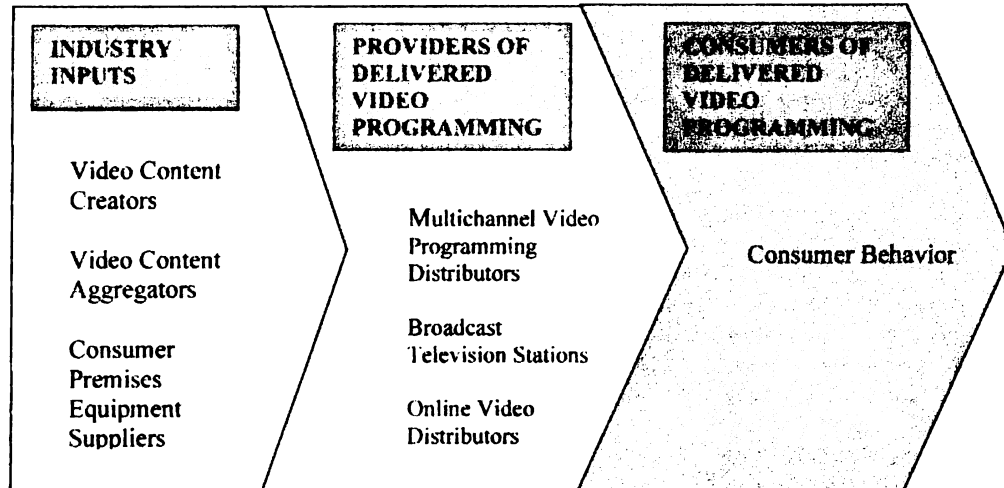
- *Structure:* The number and size of firms in each group, horizontal and vertical integration, merger and acquisition activity, and conditions affecting entry and the ability to compete.
- *Conduct:* The business models and competitive strategies used by firms that directly compete as video programming distributors, including product differentiation, advertising and marketing, and pricing.
- *Performance:* The quantity and picture quality of programming, prices charged for delivered video programming, financial indicators (e.g., revenue and profit margins), and investment and innovation activities.

Third, we look upstream and downstream to examine the influence of industry inputs and consumer behavior on the delivery of video programming. We discuss two key industry inputs: video content creators and aggregators and consumer premises equipment.²¹ Figure 1 below displays the scope of the 14th Report.

¹⁹ We assign entities that deliver video content to one of three groups based on the “strategic group” concept used in strategic management that groups companies within an industry that have similar business models or similar combinations of strategies. See Michael E. Porter, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* 129-155 (Free Press) (1980) (“Porter”). The three groups also may be said to represent the historical development of delivered video where consumers initially had access to over-the-air broadcast television, then a growing number of MVPDs, and most recently the Internet. Our placement of delivered video providers into one of three groups is an organizational convenience to facilitate discussion.

²⁰ We note that, in the past, we reported on web-based Internet video, focusing on the content available over the Internet for downloading and streaming. In this Report, we treat OVDs as a separate group because we have concluded that for most consumers they are not a substitute for MVPD service today, but rather an additional method for viewing video content. See *Comcast-VBCU Order*, 26 FCC Red at 4264-72, ¶¶ 79-85.

²¹ As described more fully below in Section V, content creators are firms that produce video programming and content aggregators are entities that assemble packages of video programming for distribution.

Figure 1: *Scope of 14th Report*

C. Data Sources

16. The information and data presented in this Report are based, in part, on comments we received from interested parties in response to the notices of inquiry in this proceeding.²² In addition, we also rely on a variety of publicly available sources of industry information and data including: Securities and Exchange Commission filings; data from trade association and government entities; data from securities analysts and other research companies and consultants; company news releases and websites; newspaper and periodical articles; scholarly publications; vendor product releases; white papers; and various public Commission filings, decisions, reports, and data.

17. As we have done for previous reports on the status of competition for the delivery of video programming, we requested data as of June 30 of the relevant year to monitor trends on an annual basis.²³ To continue our time-series analysis, and to the extent possible, we report as of June 30, 2007, June 30, 2008, June 30, 2009, and June 30, 2010. However, because a significant amount of information and data are reported on a calendar year basis we provide year-end data when June 30 information is not readily available. In addition, to the extent we find more recent Commission decisions and industry developments relevant, we include this information.

²² See *supra*, nn. 14 & 16. Appendix A contains a list of commenters.

²³ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Notice of Inquiry, 21 FCC Rcd 12229, 12230, ¶ 2 (2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Notice of Inquiry, 20 FCC Rcd 14117, 14118, ¶ 2 (2005).

III. PROVIDERS OF DELIVERED VIDEO PROGRAMMING

A. Multichannel Video Programming Distributors

1. Introduction

18. As noted above, for purposes of this Report we have categorized entities that deliver video programming into one of three groups.²⁴ We focus in this section on the MVPD group. As defined by statute, an MVPD is an entity that makes available for purchase multiple channels of video programming.²⁵ Thus, the MVPD group includes cable operators,²⁶ DBS operators, and telephone companies that offer multiple channels of video programming. For purposes of this Report, we also include in the MVPD group other entities that sell multiple channels of video programming to consumers, including, home satellite dishes ("HSD"), open video systems ("OVS"), electric and gas utilities, wireless cable systems,²⁷ private cable operators ("PCO"),²⁸ commercial mobile radio services ("CMRS"), and other wireless providers. Inclusion of an entity in the MVPD group is based on the similarity of the video service provided to the consumer, not on the technology used (e.g., coaxial cable, fiber, spectrum) or the identity of the parent company (e.g., cable operator, telephone company), or any regulatory classification (e.g., cable service, open video system). In most cases, the entities we include in the MVPD group represent themselves publicly, in reports to their shareholders and press releases to the news media, as retailers of video packages that include a large number of channels. In total, the MVPD group is comprised of 42 cable MVPDs with over 20,000 subscribers each and over 1,000 cable MVPDs with less than 20,000 subscribers each, two DBS MVPDs (DIRECTV and DISH Network), two large telephone company MVPDs (AT&T and Verizon) and numerous smaller telephone company MVPDs.²⁹

19. Today, the major MVPDs offer hundreds of linear television channels, which are streams of programming that offer video programs on a specific channel at a specific time of day. Many MVPDs also offer thousands of non-linear video-on-demand ("VOD") programs, including pay-per-view ("PPV") programs, which allow consumers to select and watch video programs whenever they request them. In this Report, we discuss a broad range of video programming that includes both linear and non-linear video programs.

20. An MVPD may offer services other than delivered video services using the same network infrastructure or through cooperative arrangements with other companies. For example, some MVPDs also offer high-speed Internet access service and telephone service. Although the focus of this Report is delivered video services, these non-video services are important to the business strategies of some

²⁴ See *supra*, ¶ 2 & n. 6.

²⁵ Specifically, Section 602 (13) of the Act, as amended, defines MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service ("DBS"), or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13). This Report does not address the extent to which wireless providers of video programming other than DBS, wireless cable system operators, home satellite dishes, and private cable operators should be classified as MVPDs under the Act. As previously noted, the Media Bureau is currently seeking comment on the interpretation of the terms "MVPD" and "channel." See *supra*, n. 6.

²⁶ Large and medium-size cable companies that serve many homes in multiple geographic areas by operating multiple cable systems are often referred to as multiple system operators ("MSOs").

²⁷ Wireless cable systems use the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") to transmit video programming to subscribers.

²⁸ Private cable operators were formerly known as satellite master antenna ("SMATV") systems.

²⁹ See *infra*, n. 32.

MVPDs and may shift the focus of competition from standalone delivered video services to bundles of video, Internet, and telephone services.

21. Although MVPDs have traditionally delivered video programming to television sets, some MVPDs are moving beyond the television and delivering video programming to computer screens, tablets, and smartphones. The expansion of MVPD's delivered video programming from television to other stationary and mobile devices – generally known as TV Everywhere³⁰ – represents a new opportunity for MVPDs that may affect their business models and competitive strategies.³¹

22. When available, this Report uses information and data directly from the MVPDs as reported to the Commission and/or a company's shareholders. For privately held companies we primarily rely on data from SNL Kagan.³² The MVPD group also includes two DBS MVPDs, DIRECTV and DISH Network, and two large telephone company MVPDs, Verizon FiOS and AT&T U-verse. For those four companies we primarily use data found in reports to shareholders.

23. On the other hand, with respect to some other types of MVPDs, including HSD, OVS, PCO, there is little or no publicly or commercially available data. Comments filed for this Report provide limited data on those entities. Considering that the combined market share of these other types of MVPDs represents less than one percent of MVPD subscribers, their relevance to competition in the market for the delivery of video programming is limited.³³ Thus, we do not believe that a lack of data regarding these types of MVPDs will significantly hinder our analysis of competition in the market for delivered video services.

24. Consumers shop for MVPD alternatives in the areas where they live. However, determining which MVPDs offer video service in which geographic areas is difficult as a result of the wide variation in the geographic footprints of MVPDs and the lack of available data that would allow comparison of the geographic coverage of one type of MVPD with another type of MVPD.³⁴ For

³⁰ TV Everywhere is an authentication system whereby certain movies and television shows are accessible online via a variety of display devices including personal computer, mobile, and television – but only if you can prove (or “authenticate”) that you have a subscription to an MVPD. See definition of TV Everywhere, The Interactive TV Institute, <http://www.itvdictionary.com/definitions/tv-everywhere-initiative-definition.html> (visited Feb. 24, 2012).

³¹ Different MVPDs use different terms to market video services to other stationary and mobile devices. In this Report, we use the term “TV Everywhere” as a generic term for these video services.

³² Over the period 2006 to 2010, Cox Communications Inc., Bright House Networks, LLC, Cequel Communications Holdings I, LLC d/b/a Suddenlink Communications (“Suddenlink”), and Insight Communications Company, Inc. were privately held cable MVPDs. These companies represented four of the ten largest cable MVPDs at the end of 2010. SNL Kagan, <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2010Q4&sortcol=subscribersbasic&sortorder=desc> (visited Feb 24, 2012).

³³ SNL Kagan estimates that at the end of 2011 there are a total of 101.2 million MVPD subscriptions. Of these, cable MVPDs account for 58.3 million subscriptions, DBS accounts for 33.9 million subscriptions, and telephone MVPDs account for 8.3 million subscriptions. Thus, the remaining types of MVPDs account for approximately 0.7 million subscriptions and almost all of these are PCO subscriptions. SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2-3.

³⁴ The Commission's Mobile Wireless Report collects data on a census block basis and the Commission's Broadband Report collects data on a census block basis. For video services, however, we do not collect data on a census block basis. *Fifteenth Mobile Wireless Report*, 26 FCC Rcd 9668, ¶ 2 (2011); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, (continued....)

instance, DBS MVPDs provide a nationwide footprint. Cable MVPDs, however, operate in discrete geographic areas defined by the boundaries of their individual systems and provide data to the Commission on a “cable system” basis.³⁵ Similarly, the Commission collects data related to telephone MVPDs only to the extent that they operate under cable franchises, and thus on a cable system basis. As a result, there is no reliable method to match DBS MVPD data with cable MVPD or telephone MVPD data on a common geographic basis. We do not have the data necessary to systematically identifying with respect to any specific geographic area which MVPDs compete for the delivery of video services.

2. MVPD Structure

25. A key element of our analysis of video competition is an examination of the MVPD industry structure, including the various types of companies within the MVPD group and their place in the market for the delivery of video programming. In this section of the Report, we describe the structure of cable, DBS, telephone, and other MVPDs. We then examine horizontal concentration and vertical integration in the market. Next, we describe conditions effecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry in the market.

a. Cable, DBS, Telephone, and Other Providers

26. The major MVPDs now offer hundreds of television channels as well as thousands of video programs through VOD services, many are offered in high-definition (“HD”). The major MVPDs offer delivered video programming as a standalone service or in combination with Internet access and telephone services. Cable MVPDs typically offer video, Internet access, and telephone services using their own facilities. DBS MVPDs offer video services using their own facilities and typically enter into cooperative arrangements with other entities to offer Internet access and telephone services.³⁶ Telephone MVPDs offer video, Internet access, and telephone services using their own facilities where they have upgraded systems. Where they have not upgraded systems, telephone MVPDs usually offer video through cooperative arrangements with DBS MVPDs.

27. *Cable MVPDs.* Historically, cable companies rarely competed with one another in the same geographic area. In some locations, cable operators built cable systems where cable MVPDs already provided video service, but this is the exception, not the rule. The introduction of DBS MVPDs with national footprints in the 1990s changed the competitive landscape and increased competition in the market for the delivery of video programming. In geographic areas that did not have access to cable MVPDs, the DBS companies competed with one another. In geographic areas with access to cable

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Amended by the Broadband Data Improvement Act, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Red 8008, 8022-23, ¶¶ 23-24 (2011).

³⁵ A large cable MVPD will operate many cable systems of varying sizes. The geographic configuration of a cable system is determined by its physical system, which consists of a cable system technically integrated to a principal headend. The Commission collects cable system data in its Annual Report of Cable Television Systems (FCC Form 325). Only a limited number of cable systems provide data to the Commission. All cable systems with more than 20,000 subscribers are subject to the reporting requirement. The Commission also collects information on a random sample of cable systems with between 5,000 and 20,000 subscribers and a random sample of cable systems with fewer than 5,000 subscribers. Specifically for the filing year 2010, the FCC Form 325 collected data from all 613 cable systems with more than 20,000 subscribers, 279 of the 499 cable systems with 5,000 to 20,000 subscribers, and 170 of the 4,427 cable systems with less than 5,000 subscribers.

³⁶ For example, DISH Network has cooperative arrangements with Verizon, AT&T, CenturyLink, Frontier, and other telephone companies to offer a combination of video, Internet, and telephone services. DISH Network, <http://direct.digitallanding.com/default.aspx?PromoID=5003072&campaign=Online&SID=6c4acd07-a7e0-4135-95fe-bc624de06eb6> (visited Jan. 20, 2012).

MVPDs, the DBS companies competed with one another and with the incumbent cable MVPDs. The level of competition increased again with the entry of Verizon in 2005 and AT&T in 2006, two large facilities-based telephone MVPDs, which began offering video service in geographic areas already served by cable MVPDs.³⁷ Today, a small number of geographic areas have as many as five MVPDs (*i.e.*, two cable MVPDs, two DBS MVPDs, and a telephone MVPD) directly competing with one another in the delivery of video programming. At the other end of the spectrum, some geographic areas (*e.g.*, rural areas) have only two MVPDs (*i.e.*, the two DBS MVPDs) directly competing with one another.

28. At the end of 2011, 1,157 cable companies provide MVPD service to 34,005 communities.³⁸ Depending on the number of homes and the geographic size of the community, cable operators use one or more cable systems to provide video service to the community.³⁹ A cable system is a physical system integrated to a principal headend.⁴⁰ Currently there are 5,312 cable systems.⁴¹ In pursuit of efficiencies, cable MVPDs may operate a group of cable systems in a metropolitan area or region. Small cable companies that serve few homes in a single geographic area often operate only one cable system.

29. The geographic reach of cable MVPDs varies from company to company. No cable operator provides nationwide coverage or statewide coverage. There are always geographic areas or populations within a state not served by the cable operator. The largest MVPD, Comcast, offers video programming in parts of 39 states and the District of Columbia.⁴² Some cable MVPDs focus their provision of video programming on a regional basis. For example, Mediacom focuses on serving the smaller cities in 22 states, primarily in the Midwestern and Southeastern regions of the United States.⁴³ BendBroadband, the 38th largest cable MVPD, serves 12 communities in Central Oregon. Sweetwater Cable, the 52nd largest cable MVPD, serves two communities in Wyoming. The majority of cable MVPDs are smaller companies offering video programming to a few communities or a single town.⁴⁴

³⁷ AT&T U-verse service launched commercially in San Antonio, TX on June 26, 2006. AT&T, *AT&T U-verse Timeline*, <http://www.att.com/Common/merger/files/pdf/U-verse%20Timeline41907.pdf> (visited Feb. 24, 2012). Verizon FiOS service launched in September 2005. Mari Sibley, *Timeline: The Evolution of FiOS Tv*, MediaExperiences2Go, <http://connectedhome2go.com/2010/08/19/timeline-the-evolution-of-fios-tv> (visited Feb. 24, 2012).

³⁸ FCC staff analysis of the Cable Operations and Licensing System (COALS) database on Dec. 16, 2011.

³⁹ A cable system is a physical system integrated to a principal headend. Often cable systems are clustered together using some of the same infrastructure to provide cable service to a larger geographic area (*e.g.*, metropolitan area). See 47 U.S.C. § 522(7).

⁴⁰ See *id.*

⁴¹ The Cable Operations and Licensing System (COALS) database shows 5,312 active, registered cable systems on Dec. 14, 2011. This number includes cable systems operated by Verizon.

⁴² Comcast Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 (“Comcast 2010 Form 10-K”).

⁴³ Mediacom Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 4 (“Mediacom 2010 Form 10-K”).

⁴⁴ FCC staff analysis of the COALS database on Dec. 16, 2011 shows that of the 1,157 cable operators, 756 cable operators have one cable system, 135 cable operators have two cable systems, and 67 cable operators have three cable systems. For additional information regarding the characteristics of small and medium-sized cable MVPDs, see American Cable Association, http://www.americancable.org/about_us (visited Feb. 24, 2012).

30. The five largest cable MVPDs in 2006 were Comcast, Time Warner Cable, Cox Communications, Charter Communications, and Cablevision Systems.⁴⁵ These same companies were also the five largest cable MVPDs in 2010.⁴⁶ In 2006, the five largest cable MVPDs accounted for approximately 79 percent of all cable MVPD subscribers.⁴⁷ In 2010, these companies accounted for approximately 80 percent of all cable MVPD subscribers.⁴⁸ The ten largest cable MVPDs in 2006 included the top five and Bright House Networks, Suddenlink Communications, Mediacom, Insight Communications,⁴⁹ and Cable One.⁵⁰ These same companies were also the ten largest MVPDs in 2010.⁵¹ In 2006, the ten largest cable MVPDs accounted for approximately 90 percent of all cable MVPD subscribers.⁵² In 2010, these companies accounted for approximately 89 percent of all cable MVPD subscribers.⁵³ The combined shares of all cable MVPDs accounted for approximately 68 percent of MVPD subscribers at the end of 2006.⁵⁴ This fell to approximately 60 percent of MVPD subscribers at the end of 2010.⁵⁵

⁴⁵ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 20.

⁴⁶ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 25.

⁴⁷ At the end of 2006, there were approximately 65.4 million basic cable subscribers and the top five cable MVPDs accounted for approximately 51.5 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 11 & 20.

⁴⁸ At the end of 2010, there were approximately 59.8 million basic cable subscribers and the top five cable MVPDs accounted for approximately 47.9 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 12 & 25.

⁴⁹ Time Warner Cable recently purchased Insight Communications. See *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, Memorandum Opinion and Order, 27 FCC Rcd 497 (IB, WCB, WTB 2012). See also Time Warner Cable, Inc., *Time Warner Cable Completes Acquisition of Insight Communications* (press release), Feb. 29, 2012.

⁵⁰ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 20.

⁵¹ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 25.

⁵² At the end of 2006, there were approximately 65.4 million basic cable subscribers and the top ten cable MVPDs accounted for approximately 58.6 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 11 & 20.

⁵³ At the end of 2010, there were approximately 59.8 million basic cable subscribers and the top ten cable MVPDs accounted for approximately 53.3 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 12 & 25.

⁵⁴ At the end of 2006, there were approximately 95.8 million MVPD subscribers and cable MVPDs accounted for approximately 65.4 million subscribers. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx?startYear=2006&endYear=2006> (visited Apr. 30, 2012).

⁵⁵ At the end of 2010, there were approximately 100.1 million MVPD subscribers and cable MVPDs accounted for approximately 59.8 million subscribers. SNL Kagan, *Special Report, U.S. Multichannel Subscriber Update and Geographic Analysis*, June 2011, at 1.

31. *DBS MVPDs.* The two DBS MVPDs, DIRECTV and DISH Network,⁵⁶ offer video service to most of the land area and population of the United States.⁵⁷ DIRECTV is the second largest MVPD in the United States with over 19 million subscribers.⁵⁸ DISH Network is the third largest MVPD with over 14 million subscribers.⁵⁹ The combined shares of the two DBS MVPDs account for approximately 34 percent of MVPD subscribers.⁶⁰

32. *Telephone MVPDs.* The two largest telephone MVPDs, AT&T and Verizon, have constructed systems for delivering video services in some of the areas where they have offered traditional landline telephone services. Verizon FiOS has registered with the Commission as a cable system whereas AT&T U-verse has not. The geographic footprints for Verizon FiOS and AT&T U-verse do not overlap. It is almost always the case, however, that the geographic footprints for AT&T U-verse and Verizon FiOS overlap areas already served by incumbent cable MVPDs. At the end of 2010, telephone MVPDs had 6.9 million video subscribers and AT&T and Verizon accounted for nearly 6.5 million,⁶¹ Verizon FiOS being the seventh largest MVPD with approximately 3.5 million subscribers and AT&T U-verse the ninth largest with approximately 3.0 million subscribers.⁶² We estimate that telephone MVPDs accounted for approximately seven percent of all MVPD subscribers.

33. The remaining telephone MVPDs are small by comparison with AT&T and Verizon. SureWest Communications is the third largest telephone MVPD with 61,800 video subscribers.⁶³ Consolidated Communications is fourth with 29,200 video subscribers. Cincinnati Bell is the fifth with 24,000 video subscribers. Hickory Technology is the sixth with 10,600 video subscribers. The remaining telephone MVPDs account for approximately 335,800 video subscribers.⁶⁴ CenturyLink offers video service through cooperative arrangements with DBS MVPDs, but recently began offering video service in limited geographic areas using its own upgraded facilities. Similar to the largest telephone MVPDs, some smaller telephone MVPDs register with the Commission as cable systems while others do not. Cincinnati Bell and SureWest have registered with the Commission while CenturyLink has not.

⁵⁶ Sky Angel, a DBS MVPD, ceased its DBS operations on April 1, 2008, and began offering its subscription video content online.

⁵⁷ We recognize that some homes are not able to receive DBS signals and DBS does not provide coverage to some land areas in Alaska.

⁵⁸ DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2010*, at 2 ("DIRECTV 2010 Form 10-K").

⁵⁹ DISH Network, *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 ("DISH Network 2010 Form 10-K").

⁶⁰ At the end of 2010, there were approximately 100.1 million MVPD subscribers and DBS MVPDs accounted for approximately 33.4 million subscribers. SNL Kagan, *Special Report, U.S. Multichannel Subscriber Update and Geographic Analysis*, June 2011, at 1.

⁶¹ *Id.*

⁶² Verizon 6/8/11 Comments at 5-6; AT&T 6/8/11 Comments at 2-3.

⁶³ On February 6, 2012, Consolidated Communications Holdings, Inc. and SureWest Communications entered into a definitive agreement under which Consolidated will acquire all the outstanding shares of SureWest in a cash and stock transaction. See SureWest, *Consolidated Communications to Acquire SureWest Communications* (press release), Feb. 6, 2012. Consolidated and SureWest consummated the deal on July 2, 2012. See Consolidated Communications Holdings, Inc., *Consolidated Communications Completes Acquisition of SureWest Communications* (press release), July 2, 2012.

⁶⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 42.

34. Little data exists regarding other telephone MVPDs. A recent survey conducted by the National Telecommunications Cooperative Association, ("NTCA"), however, estimates that in 2010, 252 NTCA members offered MVPD service using legacy coaxial cable technology. This is down from 2007, when 276 provided the service. Cooperative arrangements that bundle Internet access and telephone services offered by NTCA members with the video services of DBS MVPDs have also declined from 106 in 2007 to 66 in 2010. In contrast, MVPD service using Internet Protocol Television ("IPTV") technology has grown from 61 rural telephone companies in 2007 to 159 in 2010. Rural Associations state that the ability to offer a quality MVPD service is viewed as a key driver of broadband deployment in rural areas.⁶⁵

35. *Other MVPDs.* We received few comments and there is little or no publically available data for home satellite dishes ("HSD"), open video systems ("OVS"), electric and gas utilities, wireless cable systems, PCO, CMRS and other wireless providers. With the exception of CMRS,⁶⁶ most of these other types of MVPDs serve few subscribers and their subscriber base is declining.⁶⁷ Data for September 2011, suggest that these other types of MVPDs collectively account for approximately 0.7 percent of all MVPD subscribers.⁶⁸ PCO's accounts for the overwhelming bulk of the alternative MVPD subscribers, with approximately 650,000 subscribers.⁶⁹ This represents a decline from 900,000 subscribers in 2006.⁷⁰ The HSD, or large dish, segment of the satellite industry is the original satellite-to-home service offered to consumers. In the last report, we estimated that there were approximately 110,000 HSD subscribers in June 2006.⁷¹ Today, there are fewer entities offering HSD subscription service. In December 2010, National Programming Service, LLC, a provider of HSD programming, announced that it would cease providing HSD programming at the end of 2010. A company called Skyvision currently appears to offer HSD service during limited hours of each day.⁷² However, according to SNL Kagan, there are currently no reported HSD subscribers.⁷³

⁶⁵ Rural Associations 6/8/11 Comments at 2-3. NTCA states, "As video delivery moves to an IP format, video demand will spur broadband deployment and broadband availability will increase video demand. The two are intrinsically linked." NTCA 5/19/2009 Comments at 2.

⁶⁶ We do not discuss CMRS in this Report because all aspects of CMRS and the larger mobile wireless industry are covered in the *Fifteenth Mobile Wireless Report*. Here we simply note that subscribers to a mobile wireless data plan may receive delivered video programming for viewing on some mobile wireless devices.

⁶⁷ SNL Kagan states, "Alternative multichannel providers, which include multichannel multipoint distribution service and wireless cable services, count a negligible 0.7% of the total multichannel universe. The outlook for the segment calls for a steady and gradual decline in subscribers, which should reduce the number of customers relying on those services to about 300,000 by the end of 2021." SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *13th Report*, 24 FCC Red at 609, ¶ 140.

⁷¹ *Id.* at 589, ¶ 94. We previously measured the number of HSD subscribers in terms of the number of households subscribing to a programming service, although we recognized that some HSD households simply relied on unscrambled programming that was available without a subscription to a program service.

⁷² Skyvision, <http://www.skyvision.com> (visited Nov. 30, 2011).

⁷³ SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2.

36. With respect to OVS, we recognized in the last report that new OVS activity has been limited.⁷⁴ Although some entities have subsequently filed for certifications to operate OVS systems, we suspect that most OVS subscribers are included in cable MVPD subscriber data and we have no way to count them separately. Although there may be some companies still offering wireless cable service, SNL Kagan data show that there are not any subscribers.⁷⁵ Because the alternative MVPDs account for such a small and shrinking share of the market for the delivery of video programming, and because data for these alternative MVPDs are not available, we focus our MVPD discussion on cable, DBS, and telephone MVPDs.

37. Table 1 shows estimates of the number of homes passed by cable, DBS, and telephone MVPDs for year-end 2006, 2007, 2008, 2009, and 2010. Cable MVPDs have built out and to a large extent upgraded their systems.⁷⁶ In 2006, cable MVPD service was available to 121.6 million homes (96.0 percent of the 126.7 million U.S. homes). By 2010, cable MVPD service was available to 128.8 million homes (98.5 percent out of 130.8 million U.S. homes). We assume that DBS MVPDs are available to all homes, but recognize that this slightly overstates the actual availability of DBS.⁷⁷ Telephone MVPDs greatly expanded their reach between 2006 and 2010. In 2006, facilities-based telephone MVPD service was available to approximately six million homes (4.7 percent). By 2010, telephone MVPD service had become available to 42.9 million homes (32.8 percent).

⁷⁴ 13th Report, 24 FCC Rcd at 607, ¶ 135.

⁷⁵ Watch Communications is a wireless cable system that serves 10,000 homes in Northwest Ohio. See Watch Communications, <http://www.watchtv.net/?p=about> (visited Jan. 13, 2012). See also W.A.T.C.H. TV 5/20/2009 Comments; W.A.T.C.H. TV 7/29/2009 Comments. See also SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2; NCTA 5/20/2009 Comments at 8.

⁷⁶ The upgrading of cable systems often includes increasing bandwidth capacity to provide additional channels, more HD channels, and faster Internet service. In addition, in their upgrades, cable MVPDs have included the use of data over cable service interface specifications ("DOCSIS"), which is a standard interface for cable modems that handle incoming and outgoing data signals between cable MVPDs and computers or television sets. See SearchNetworking, <http://searchnetworking.techtarget.com/definition/DOCSIS> (visited Feb. 24, 2012).

⁷⁷ We recognize that physical features (e.g., tall buildings, cliffs, trees) can prevent some homes from receiving DBS signals.

Table 1: Homes Passed by MVPDs (in millions)

Year	2006	2007	2008	2009	2010
Cable⁷⁸	121.6	123.9	125.6	127.1	128.8
Comcast	47.4	48.5	50.6	51.2	51.9
Time Warner	26.1	26.5	26.8	27.1	27.5
Cox	9.3	9.5	9.7	9.8	9.9
Charter	11.8	11.7	11.9	11.9	11.8
Cablevision	4.6	4.7	4.7	4.8	5.5
Bright House	4.0	4.1	4.1	4.2	4.2
Suddenlink	2.8	2.6	2.6	2.6	2.7
Mediacom	2.8	2.8	2.8	2.8	2.8
All Other Cable ⁷⁹	12.8	10.9	12.3	12.5	12.5
DBS⁸⁰	126.7	128.6	129.4	130.6	130.8
DIRECTV	126.7	128.6	129.4	130.6	130.8
DISH Network	126.7	128.6	129.4	130.6	130.8
Telephone⁸¹	6.0	17.3	29.7	38.2	42.9
AT&T U-verse ⁸²	N/A ⁸³	8.0	17.0	22.8	27.3
Verizon FiOS ⁸⁴	6.0	9.3	12.7	15.4	15.6

⁷⁸ Cable homes passed excludes overlap from overbuilders (defined as companies that build additional cable systems "over" one that already exists and offer customers a competitive alternative). Data for cable and cable companies come from SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 16, 2011).

⁷⁹ We estimate cable homes passed by all other cable operators by subtracting the number of cable homes passed by the eight largest cable operators from total cable homes passed.

⁸⁰ For simplification, we assume that DBS is available to every housing unit. The number of housing units is from U.S. Census Bureau and SNL Kagan estimates. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 16, 2011). A housing unit is a house, an apartment, a mobile home or trailer, a group of rooms, or a single room that is occupied, or, if vacant, is intended for occupancy as separate living quarters. Both occupied and vacant housing units are included in the housing unit inventory, except recreational vehicles, boats, vans, tents, railroad cars, etc. are included only if occupied as a usual place of residence. Vacant mobile homes are included if intended for occupancy on site. Vacant mobile homes on dealer sales lots, at the factory, or in storage yards are excluded from the housing unit inventory.

⁸¹ For telephone, we simply add the estimates for AT&T U-verse and Verizon FiOS. We do not have reliable estimates for the number of homes passed by other telephone companies offering their own facilities-based video services.

⁸² AT&T, Inc., *2006 Annual Report* at 31; *2007 Annual Report* at 38; *2008 Annual Report* at 35; *2009 Annual Report* at 43; *2010 Annual Report* at 42.

⁸³ At year-end 2006, AT&T was providing U-verse services, including U-verse TV (IPTV) video, in limited parts of 11 markets. AT&T, *2006 Annual Report* at 31.

⁸⁴ Verizon Communications, *2006 Annual Report* at 19; *2007 Annual Report* at 18; *2008 Annual Report* at 14; *2009 Annual Report* at 14; *2010 Annual Report* at 15.

b. Horizontal Concentration

38. High market concentration may suggest the potential for competitive concerns. However, an analysis of other factors, such as entry conditions and the degree of price and non-price rivalry, may suggest that even a highly concentrated market does not raise competitive concerns. As noted above, the Commission does not collect data for cable, DBS, and telephone MVPDs on a uniform geographic basis and, therefore, cannot compare the availability of one type of MVPD with another in a particular geographic area.⁸⁵ Instead, we estimate here the number of homes on a nationwide basis that have access to two, three, or four MVPDs.

39. As a general rule, the geographic footprint of a cable MVPD rarely overlaps the geographic footprint of another cable MVPD. As such, cable MVPDs rarely compete with one another for the same video subscriber. The situation is similar for telephone MVPDs. The geographic footprint of one telephone MVPD rarely overlaps the geographic footprint of another telephone MVPD, so telephone MVPDs rarely compete with one another for the same video subscriber. In contrast, the geographic footprints of both DBS MVPDs are national and they almost always compete with one another for the same video subscriber. We also assume that a cable MVPD or a telephone MVPD almost always competes with both DBS MVPDs for the same subscriber. Finally, we assume that the two largest telephone MVPDs offer video service in geographic areas already served by incumbent cable companies and, therefore, almost always compete with a cable MVPD for the same subscriber. We have little data on additional telephone MVPDs and other types of MVPDs, and we have no means of determining the geographic footprints of these entities and, therefore, no means of determining whether they do or do not compete with incumbent cable systems. We do not include these other MVPDs in our estimates and recognize that their absence may marginally understate access to MVPDs.⁸⁶

40. Using our assumptions and the data from Table 1 above, we estimate MVPD concentration nationwide -- specifically, the number of homes that have access to two, three, or four MVPDs. Our estimates are shown in Table 2.

In 2006,

- There were 126.7 million homes in the United States.
- Approximately 5.1 million homes had access to the two DBS MVPDs only.⁸⁷
- Approximately 115.6 million homes had access to three MVPDs only (*i.e.*, a cable MVPD and two DBS MVPDs, but not a telephone MVPD).⁸⁸
- Approximately 6.0 million homes had access to at least four MVPDs (*i.e.*, a cable MVPD, two DBS MVPDs, and a telephone MVPD).⁸⁹

In 2010,

- There were 130.8 million homes in the United States.
- Approximately 2.0 million homes had access to the two DBS MVPDs only.

⁸⁵ See *supra*, ¶ 24.

⁸⁶ For example, the presence of RCN (a cable overbuilder) in Montgomery County, Maryland, provides some households with access to five MVPDs. Montgomery County 7/8/11 Reply at 10.

⁸⁷ We assume that all homes have access to the DBS MVPDs. Our estimate is derived by subtracting the number of homes that have access to cable MVPDs from the number of homes that have access to the DBS MVPDs.

⁸⁸ We assume that homes that have access to a cable MVPD also have access to DBS MVPDs.

⁸⁹ We assume that homes that have access to one of the two largest telephone MVPDs also have access to a cable MVPD and the DBS MVPDs.

- Approximately 85.9 million homes had access to three MVPDs only (*i.e.*, a cable MVPD and two DBS MVPDs, but not a telephone MVPD).
- Approximately 42.9 million homes had access to at least four MVPDs (*i.e.*, a cable MVPD, two DBS MVPDs, and a telephone MVPD).

These estimates are only approximations due to the limits of available data, but they highlight the fact that with the entry of large telephone MVPDs into the market for video services, almost 43 million homes have access to four MVPDs. This entry represents a significant increase in competition in the market for the delivery of video programming. Specifically, between 2006 and 2010, we transitioned from a market structure where only 4.7 percent of homes had access to a fourth MVPD, to a market structure where one-third of U.S. homes have access to a fourth MVPD.

Table 2: Access to Multiple MVPDs

	Homes 2006	Percent of Homes 2006	Homes 2010	Percent of Homes 2010
Access to Two MVPDs Only	5.1 million	4.0%	2.0 million	1.5%
Access to Three MVPDs Only	115.6 million	91.2%	85.9 million	65.7%
Access to at Least Four MVPDs	6.0 million	4.7%	42.9 million	32.8%

41. Because we do not have geographic data for all MVPDs on any common geographic basis, we cannot calculate a Herfindahl-Hirschman Index ("HHI"), the traditional metric for measuring horizontal concentration.⁹⁰ We, however, can state with some degree of confidence that in geographic

⁹⁰ The HHI is calculated by summing the squares of the individual market shares of all the participants. For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Lack of information about small firms is not critical to the calculation because such firms do not affect the HHI significantly. See Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, at 18-19 ("Horizontal Merger Guidelines").

The Commission has applied an HHI screen in its analysis of transactions involving MVPDs. See, e.g., *EchoStar-DIRECTV IDO*, 17 FCC Red at 20614-16, ¶¶ 133-39 (2002). See also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Red 8203, 8239-43, ¶¶ 75-83 (2006) ("2006 Adelphia, Comcast, Time Warner Cable MO&O").

In addition, in past reports, we have estimated a national MVPD HHI for purposes of analyzing concentration in the market for the purchase of video programming. See, e.g., *13th Report*, 24 FCC Red at 627-28, ¶ 179; *id.* at 689, Table B-4. In the market for the purchase of video programming, our economic concern was one of monopsony power where few or large buyers could drive down the prices received by the owners of video programming. In this Report, our focus is the market for the delivery of video programming and our economic concern is one of monopoly power where few sellers of MVPD video services could drive up the prices paid by subscribers.

areas where homes have access to four MVPDs, the HHI is over 2500.⁹¹ Likewise, in geographic areas where homes have access to three MVPDs, the HHI is over 3333, and in geographic areas where homes have access to two MVPDs, the HHI is over 5000. Although these HHI may appear high, the entry of DBS in the 1990s and the more recent entry of telephone MVPDs have resulted in an ongoing reduction in MVPD market concentration. Stated differently, since the Commission's first report on the status of competition in the market for the delivery of video programming in 1995, almost no subscriber has fewer MVPD choices and most subscribers have more MVPD choices.

c. Vertical Integration

42. Our examination of vertical integration in the MVPD industry focuses on common ownership of entities that deliver video programming and entities that supply video programming. Vertical relationships may have beneficial effects,⁹² or they may deter competitive entry in the video marketplace or limit the diversity of video programming.⁹³ In 1992, Congress enacted various provisions related to vertical integration between cable operators and programming networks (e.g., program access, channel occupancy limit).⁹⁴ In 1992, a large number of the most popular cable programming networks were owned by cable operators. Congress was concerned that cable operators had the ability and incentive to thwart the competitive development of additional programming networks by refusing to carry unaffiliated networks, by insisting on an ownership stake in return for carriage, or by withholding their most popular programming networks from competing MVPDs.⁹⁵

43. In the last report, for 2006, the Commission identified 565 satellite-delivered national programming networks and found that 84 were affiliated with at least one cable MVPD.⁹⁶ Five of the top seven cable operators – Comcast, Time Warner, Cox, Cablevision, and Advance/Newhouse – held ownership interests in 84 satellite-delivered national programming networks. Time Warner had ownership interests in 39 national networks, Cox had ownership interests in 26 national networks, Advance/Newhouse (owner of cable operator Bright House) had ownership interests in 24 national

⁹¹ For a given number of firms, the value of the HHI increases as the inequality in subscriber shares increases. For example, if four firms are identified as participants in the relevant markets and each firm accounts for 25 percent of total sales, the value of HHI would be 2500 [(25)² x 4]. If there are still only four firms but the top firm has a 40 percent subscriber share while each of the remaining three firms has 20 percent, the value of HHI increases from 2500 to 2800 [(40)² + ((20)² x 3)].

⁹² Beneficial effects can include efficiencies in the production, distribution, and marketing of video programming, as well as the incentive to expand channel capacity and create new programming by lowering the risks associated with program production ventures. See, e.g., H.R. REP. NO. 862, 102nd Congress, 2d Sess. (1992), at 41-43.

⁹³ Possible detrimental effects can include unfair methods of competition, discriminatory conduct, and exclusive contracts that are the result of coercive activity. See *Second Report*, 11 FCC Red at 2135, ¶ 157; *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Vertical Ownership Limits*, MB Docket No. 92-264, 10 FCC Red 7364, 7365, ¶ 4 (1995).

⁹⁴ See 47 U.S.C. §§ 533, 548.

⁹⁵ See 47 U.S.C. § 521(5).

⁹⁶ *13th Report*, 24 FCC Red at 629-30, ¶ 184. Because of the difficulty we find in identifying all networks, we are not providing this information in our 14th Report. However, we believe the number of networks is approximately 800. See *Revision of the Commission's Program Access Rules, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, Applications for Consent to the Assignment and or Transfer of Control of Licenses, Adelphia Communications Corporations (and Subsidiaries, debtor-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, and 05-192, Notice of Proposed Rulemaking, 27 FCC Red 3413 (2012) ("Program Access NPRM").

networks, Comcast had ownership interests in 18 national networks, and Cablevision had ownership interests in 26 national networks.⁹⁷ In addition, the report identified 23 national networks without any ownership interest by a cable operator that were affiliated with a DBS provider (e.g., News Corp. and Dominion Video Satellite).⁹⁸

44. Our review of vertical integration in early 2012 identified 127 national networks (49 of these are HD networks) affiliated with the top five cable MVPDs. Comcast has ownership interests in 78 national networks (30 are HD), Time Warner Cable has ownership interests in 12 national networks (four are HD), Cox has ownership interests in seven national networks (three are HD), Cablevision has ownership interests in five national networks (two are HD), and Bright House has ownership interests in 25 national networks (10 are HD).⁹⁹ In addition, our most recent review identifies 54 national networks that are affiliated with a DBS MVPD (21 are HD).¹⁰⁰

45. In addition to the creation of new networks between 2006 and 2010, especially HD networks, a couple of transactions had a significant impact on vertical integration. Between 2006 and 2010, News Corporation sold its interests in DIRECTV¹⁰¹ and Time Warner Inc. spun off Time Warner Cable.¹⁰² Both of these transactions severed ties between a number of networks and MVPDs.¹⁰³ In 2011,

⁹⁷ 13th Report, 24 FCC Red at 630-31, ¶ 186.

⁹⁸ *Id.* at 629-30, ¶ 184. In addition, in 2006, another 24 national networks without any attributable cable ownership were affiliated with a company that had interests in a DBS provider (e.g., Liberty Media). On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation ("Liberty") acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty, through a series of transactions, transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc. We list these networks as affiliated with this media company since Liberty and DIRECTV share common ownership, officers, and directors.

⁹⁹ For a list of the national networks owned by each of the top five cable MVPDs, see Appendix B, Table B-1.

¹⁰⁰ For a list of the national networks owned by DBS MVPDs, see Appendix B, Table B-1. Most of these networks we list as affiliated with Liberty Media. On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation ("Liberty") acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty through a series of transactions transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc.

¹⁰¹ See *News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Red 3265 (2008) ("News Corp-DirecTV Order").

¹⁰² See *Applications for Consent to Assignment and/or Transfer of Control of Licenses, Time Warner Inc., and its subsidiaries, Assignor Transferor, to Time Warner Cable Inc., and its subsidiaries, Assignee Transferee*, MB Docket No. 08-120, WC Docket No. 08-157, Memorandum Opinion and Order, 24 FCC Red 879 (MB, WC 2009). See also Time Warner Inc., *Time Warner and Time Warner Cable Agree to Separation* (press release), May 21, 2008; Time Warner Inc., *Time Warner Inc. Distributes Time Warner Cable Shares to Its Stockholders of Record and Effects One-for-Three Reverse Stock Split* (press release), Mar. 27, 2009.

¹⁰³ The News Corp. sale of DIRECTV separated the following national networks from DIRECTV: Big Ten Network, BTN HD, FOX Business Network, FOX Business Network HD, FOX College Sports, FOX College Sports HD, FOX Deportes, FOX Movie Channel, FOX News Channel, FOX News Channel HD, FOX Soccer Channel, FOX Soccer Channel HD, FOX Soccer Plus, FOX Sports Net, FOX Sports Net HD, FUEL TV, FUEL TV HD, FX Network, FX Network HD, Nat Geo WILD, Nat Geo WILD HD, National Geographic Channel, National Geographic Channel HD, SPEED Channel, SPEED HD, TV Guide Network.

In addition, the News Corp. sale of DIRECTV separated the following regional networks from DIRECTV: FOX Sports Arizona, FOX Sports Arizona HD, FOX Sports Carolinas, FOX Sports Carolinas HD, FOX Sports Detroit, . (continued....)

however, Comcast consummated a joint venture with General Electric, which joined a number of networks with that MVPD.¹⁰⁴ These three transactions had a significant impact on vertical integration.¹⁰⁵ A summary of MVPD ownership of programming networks is included in Appendix B, Table B-1; Appendix C, Table C-1; and Appendix D at the end of this Report.

d. Entry Conditions

46. MVPD entry decisions are determined primarily by entry conditions and expected profitability.¹⁰⁶ Entry conditions are important in understanding the degree to which incumbent firms may or may not possess market power.¹⁰⁷ Entry occurs in the context of underlying market and regulatory conditions that directly influence the total number of firms that can compete successfully in a market. Such conditions are relevant for determining if, and when, actual entry will occur. Both market conditions and regulatory conditions are important for facilitating competition in the marketplace.

(Continued from previous page)

FOX Sports Detroit HD, FOX Sports Florida, FOX Sports Florida HD, FOX Sports Houston, FOX Sports Houston HD, FOX Sports Indiana, FOX Sports Indiana HD, FOX Sports Kansas City, FOX Sports Kansas City HD, FOX Sports Midwest, FOX Sports Midwest HD, FOX Sports North, FOX Sports North HD, FOX Sports Ohio, FOX Sports Ohio HD, FOX Sports Oklahoma, FOX Sports Oklahoma HD, FOX Sports South, FOX Sports South HD, FOX Sports Southwest, FOX Sports Southwest HD, FOX Sports Tennessee, FOX Sports Tennessee HD, FOX Sports West, FOX Sports West HD, FOX Sports Wisconsin, FOX Sports Wisconsin HD, Sun Sports, Sun Sports HD.

Time Warner Cable's spinoff from Time Warner, Inc. separated the following national networks from Time Warner Cable: @Max, @Max HD, 5 Star Max, 5 Star Max HD, Action Max, Action Max HD, Boomerang, Cartoon Network/Adult Swim, Adult Swim HD, Cinemax, Cinemax HD, CNN, CNN HD, CNN Airport, CNN Headline News, CNN International, HBO, HBO HD, HBO2, HBO2HD, HBO Comedy, HBO comedy HD, HBO Family, HBO Family HD, HBO Signature, HBO Signature HD, HBO Zone, HBO Zone HD, More Max, More Max HD, NBA, NBA HD, Outer Max, Outer Max HD, TBS, TBS HD, TMC, TMC HD, Thriller Max, Thriller Max HD, TNT, TNT HD, Tru TV, Tru TV HD, WMAX, WMAX HD.

¹⁰⁴ See *Comcast-NBCU Order*, *supra*, n. 6. Comcast's transaction with General Electric added the following cable programming networks to Comcast: A&E, A&E HD, Bravo, Bravo HD, Chiller, Chiller HD, CNBC, CNBC HD, CNBC World, CNBC World HD, MSNBC, MSNBC HD, MUN2, Oxygen, Oxygen HD, ShopNBC, Sleuth, SyFy, SyFy HD, The Weather Channel, The Weather Channel HD, Universal HD, Universal Sports, USA, and USA HD. *Comcast-NBCU Order*, 26 FCC Red at 4410-13, Appendix D. See also *infra*, Appendix B, Table B-1.

Letter from Michael H. Hammer, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Feb. 1, 2011), *Comcast Corp., Comcast and GE to Create Leading Entertainment Company* (press release), Dec. 3, 2009; Comcast Corp., *Comcast and GE Complete Transaction to Form NBCUniversal, LLC* (press release), Jan. 29, 2011.

¹⁰⁵ We recognize that there were other transactions that involved MVPDs buying, selling, or creating networks during the period. Collectively, however, these other transactions did not have a substantive impact on vertical integration, relative to the three "big" transactions.

¹⁰⁶ High economic profits encourage entry to the market, low economic profits discourage entry, and prolonged negative economic profits induce exit from the market. See Hal R. Varian, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 394-95, 503 (W. W. Norton and Company) (1999) ("*Intermediate Microeconomics*"); Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 61-76 (Addison, Wesley, Longman, Inc.) (4th ed. 2005).

¹⁰⁷ Market power for a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation. For a discussion of market power, see *Horizontal Merger Guidelines*, *supra*, n. 90.

Because the Commission oversees the regulatory conditions potentially affecting entry, we discuss these first.¹⁰⁸ We then discuss some of the market (“non-regulatory”) conditions potentially affecting entry.

(i) Regulations Influencing Entry

47. *Franchising and Licensing.* MVPDs must obtain the proper regulatory authority before providing video services. Section 621(a)(1) of the Act gives local governments the authority to control the entry of cable operators into their respective markets through franchise agreements, but prevents them from granting an exclusive franchise or unreasonably refusing to award competitive franchises.¹⁰⁹ Each state determines which political jurisdiction (e.g., state, county, city, or town) has the authority to grant local franchises for cable service. In 2007 though, the Commission released a Report and Order adopting rules under its Section 621(a)(1) authority to eliminate the unreasonable entry barriers for competitive franchises imposed by local franchising authorities (“LFAs”) and to encourage the investment in broadband facilities.¹¹⁰ In addition, as we previously reported, 20 states have enacted video franchising laws revoking the ability of local governments to grant franchises.¹¹¹ Instead, these states have allowed cable operators and other MVPDs to receive statewide franchises in an effort to streamline the delivery of video services.¹¹² In addition to franchise agreements, cable operators may need licenses or authorizations from the Commission to deliver their programming to consumers.¹¹³

¹⁰⁸ The regulatory process, itself, may hinder entry if the process is characterized by unnecessary delay. One example of a regulatory delay would be the time a cable franchising authority may take to make a decision regarding an application. Economists argue that some operating licenses and other legal restrictions that serve to limit access to the market are barriers to entry, i.e., they create positive economic profits for incumbents that are not bid away by new entry. See Jean Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 305 (MIT Press) (1988). See also *Intermediate Microeconomics* at 395.

¹⁰⁹ 47 U.S.C. §§ 522(10), 541(a)(1).

¹¹⁰ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007), *aff’d sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). See also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633 (2007).

¹¹¹ See Charles B. Goldfarb, Cong. Research Serv., Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues for Congress 2 (Oct. 7, 2011) (“PEG CRS Report”). See also *13th Report*, 24 FCC Rcd at 660, ¶ 249, n.837. The states that have adopted statewide video franchise are: California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. See *PEG CRS Report* at 2, n.10. The United States Court of Appeals for the Fifth Circuit recently concluded that the provisions in Texas’s video franchising law barring the state’s incumbent cable operators from obtaining a state franchise until the expiration of their municipal licenses violated the First Amendment. See *Time Warner Cable, Inc. v. Paul Hudson*, 667 F.3d 630 (5th Cir. 2012).

¹¹² See *PEG CRS Report* at 2.

¹¹³ For example, many cable operators hold licenses under Part 78 of the Commission’s rules for CARS stations, which enable them to distribute programming to microwave hubs where it is impossible and too expensive to run cables and cover live events. See *Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licenses*, WT Docket No. 10-153, Report and Order, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 26 FCC Rcd 11614, 11620, ¶ 10 (2011). See also *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission’s Rules*, ET Docket No. 01-75, Report and Order, 17 FCC Rcd 22979, 22980, n.1 (2002).

48. Satellite carriers must obtain Commission authorizations to operate their satellites and earth stations prior to offering video services.¹¹⁴ Similarly, LECs providing video services through the OVS framework must secure certification from the Commission prior to initiating service.¹¹⁵ Wireless cable systems and other wireless providers using spectrum to transmit video programming must comply with the Commission's spectrum licensing policies, as well as the appropriate interference and technical rules.¹¹⁶ The Commission also maintains the authority to review any business arrangements involving the transfer and control of its licenses or authorizations.¹¹⁷

49. *Effective Competition.* Under Section 623(a) of the Act, cable operators subject to effective competition in the communities they serve are exempt from regulation of their basic cable service.¹¹⁸ LFAs therefore are permitted to regulate cable operators' basic cable service rates unless the Commission has granted a petition for effective competition.¹¹⁹ A cable operator is subject to effective competition in a local community when one of four tests are met: (1) fewer than 30 percent of the households subscribe to the operator's cable programming service; (2) the operator and at least one other MVPD provide comparable services to at least 50 percent of the households in the community and at least 15 percent of households subscribe to service of MVPDs other than the largest one; (3) a municipality offers MVPD service to at least 50 percent of households; or (4) an LEC or its affiliate, or an entity using the facilities of an LEC or its affiliate, offers MVPD service by means other than DBS service in an area that an unaffiliated cable operator also serves.¹²⁰

50. *Program Access.* Without access to video program content, new entrants cannot successfully enter into the marketplace. Sections 628(b), 628(c)(1), and 628(d) grant the Commission broad authority to prevent cable operators from engaging in unfair acts that have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite-delivered programming to consumers.¹²¹ Section 628(c)(2) of the Act ensures that competitive MVPDs obtain access to satellite programming affiliated with a cable operator.¹²² Specifically, the Commission's program access rules prevent a cable operator with an attributable interest in a satellite-delivered programming vendor from improperly influencing the vendor in the sale or delivery of its programming to a competing MVPD. In addition, a cable-affiliated satellite-programming vendor may not discriminate in the price, terms, and conditions of sale for its programming among competing MVPDs. Cable operators also are generally

¹¹⁴ 47 C.F.R. § 25.102(a).

¹¹⁵ 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502. It is left to the discretion of the LFA whether to require an OVS operator to negotiate a franchise for the service area or to impose no franchise obligation on the OVS operator. *See City of Dallas Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

¹¹⁶ *See 15th Mobile Wireless Report*, 26 FCC Red at 9714, ¶ 57.

¹¹⁷ 47 U.S.C. § 310(d).

¹¹⁸ 47 U.S.C. § 543(a)(2).

¹¹⁹ 47 U.S.C. § 543(a)(2)(A); 47 C.F.R. §§ 76.905(a), 76.907. LFAs, though, must obtain certification from the Commission prior to regulating the basic service tier. 47 U.S.C. § 543(a)(3)-(4); 47 C.F.R. § 76.910. The basic level of cable service the Act requires for cable operators subject to rate regulation includes at a minimum: (1) all commercial and noncommercial local broadcast stations entitled to carriage under the Act's must-carry provisions; (2) any public, educational, and governmental access channels the LFA requires; and (3) any other local broadcast station provided to any subscriber. 47 U.S.C. § 543(b)(7)(A).

¹²⁰ 47 C.F.R. § 76.905(b).

¹²¹ 47 U.S.C. § 548(b), (c)(1), (d).

¹²² 47 U.S.C. § 548(c)(2).

prohibited from entering into exclusive programming agreements with cable-affiliated satellite-programming vendors. MVPDs may allege violations of the program access rules by initiating an adjudicatory proceeding with the Commission through the filing of a program access complaint.¹²³

51. In 2007, the Commission released a Report and Order extending the prohibition on exclusive contracts between cable operators and cable-affiliated satellite-programming vendors until October 5, 2012.¹²⁴ The *2007 Program Access Order* also modified the program access complaint procedures and included a Notice of Proposed Rulemaking.¹²⁵ Among other revisions, the current program access rules provide for party-to-party discovery and permit the parties in a program access dispute to engage in voluntary arbitration during the pendency of the complaint.¹²⁶

52. Pursuant to Section 628(b), in 2010, the Commission adopted rules preventing cable operators from engaging in unfair acts with respect to affiliated programming that is terrestrially delivered.¹²⁷ The United States Court of Appeals for the District of Columbia ("D.C. Circuit") later upheld substantially all of this order.¹²⁸ In 2011, the Commission found that MSG and Cablevision violated both Section 628(b) and the Commission's rules when they denied AT&T and Verizon access to the terrestrially delivered HD version of the MSG and MSG+ networks.¹²⁹ According to some commenters, access to programming remains a concern in the MVPD marketplace and is a key driver in

¹²³ 47 C.F.R. §§ 76.1001-04.

¹²⁴ See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Red 17791, 17792-93, ¶ 1 (2007) ("2007 Program Access Order"), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010). In March 2012, the Commission adopted a Notice of Proposed Rulemaking seeking comment on proposed revisions to both its exclusive contracts prohibition for satellite-delivered, cable-affiliated programming and its program access rules in order to better remedy alleged rule violations, including possible discriminatory volume discounts and uniform price increases. See *Program Access NPRM*, 27 FCC Red at 3414-15, ¶ 1.

¹²⁵ See *2007 Program Access Order*, 22 FCC Red at 17793-94, ¶¶ 1-2.

¹²⁶ 47 C.F.R. § 76.1003(i)-(j). See also *2007 Program Access Order*, 22 FCC Red at 17847-59, ¶¶ 83-113. The program access rules also allow a complainant seeking renewal of an existing program contract to request that the terms and conditions of its existing contract remain in place pending resolution of the complaint. 47 C.F.R. § 76.1003(l).

¹²⁷ See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Red 746, 792-93, ¶¶ 69-70 (2010) ("2010 Program Access Order"), *aff'd in part and vacated in part sub nom. Cablevision Systems Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

¹²⁸ See *id.* at 699. The court vacated one part of the *2010 Program Access Order* – the Commission's decision to treat certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair." See *id.* at 719-23. Despite this holding, the court did not prevent the Commission from addressing on a case-by-case basis whether certain acts are "unfair." See *id.* at 723.

¹²⁹ See *Verizon Tel. Cos. et al.*, Order, 26 FCC Red 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD Regional Sports Networks from Verizon is an "unfair act" that has the "effect" of "significantly hindering" Verizon from providing satellite cable programming and satellite broadcast programming to subscribers and consumers in New York and Buffalo), *aff'd Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Red 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.). See also *AT&T Servs. Inc. et al.*, Order, 26 FCC Red 13206 (MB 2011) (reaching the same conclusion with respect to AT&T in the State of Connecticut), *aff'd AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Red 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.).

creating a competitive environment.¹³⁰ Other commenters maintain, however, that the competitiveness of the MVPD marketplace has removed the need for program access regulations.¹³¹

53. *Program Carriage.* MVPDs must be able to reach carriage agreements with video programming vendors in order to provide a competitive video service product. As a means to foster competition, Congress adopted Section 616 of the Act, which required the Commission to establish rules governing the program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors.¹³² The Commission's rules prohibit cable operators or other MVPDs from requiring a financial interest in a video programming vendor or obtaining exclusive rights to programming as conditions for carriage.¹³³ MVPDs also are prevented from discriminating against video programming vendors on the basis of affiliation in the selection, terms, or conditions of carriage to the extent the effect of such conduct is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.¹³⁴ An aggrieved MVPD or video programming vendor may file a complaint for alleged violations.¹³⁵

54. The Commission in 2011 released a Second Report and Order clarifying the program carriage complaint process. In particular, this order codified the requirements for establishing a *prima facie* program carriage violation; established deadlines for action by the Media Bureau and Administrative Law Judges in response to a complaint; extended the deadline for a defendant to respond to a complaint; and implemented procedures for the Media Bureau to consider requests seeking a temporary standstill of an existing programming contract pending the resolution of a complaint.¹³⁶ The Commission also issued a Notice of Proposed Rulemaking seeking comment on further revisions to the procedural and substantive program carriage rules in order to assist the resolution of carriage disputes.¹³⁷

¹³⁰ See, e.g., AT&T 7/8/11 Reply at 1-2; DIRECTV 7/8/11 Reply at 2-3; AT&T 6/8/11 Comments at 7; Verizon 6/8/11 Comments at 16; Consumer Union 7/29/09 Comments at 3-4; AT&T 6/20/09 Reply at 2-4; DIRECTV 5/20/09 Comments at 17. Small and rural MVPDs also indicate that they face difficulties in obtaining access to video content under competitive prices and terms. These concerns are raised in Section IV of this Report.

¹³¹ See, e.g., NCTA 6/8/11 Comments at 16-17; Comcast 6/8/11 Comments at 36-39.

¹³² 47 U.S.C. § 536. Congress enacted Section 616 after finding that some cable operators were requiring non-affiliated programmers to grant them exclusive rights to programming or provide them with a financial interest in it as a condition for carriage. See 13th Report, 24 FCC Red at 639, ¶ 202.

¹³³ 47 C.F.R. § 76.1301(a)-(b).

¹³⁴ 47 C.F.R. § 76.1301(c).

¹³⁵ 47 C.F.R. § 76.1302(a). In October 2011, the Game Show Network ("GSN") filed a program carriage complaint against Cablevision alleging that the cable operator violated the anti-discrimination provision of the program carriage rules when it repositioned GSN from an expanded basic tier to a sports tier. GSN argues that this move separates it from its primarily female audience and is advantageous for WE tv and Wedding Central, two networks affiliated with Cablevision. See *Game Show Network, LLC v. Cablevision Systems Corp.*, Program Carriage Complaint, CSR-8529-P (filed Oct. 12, 2011). The Media Bureau issued a Hearing Designation Order for the complaint in May 2012. See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Red 5113 (MB 2012).

¹³⁶ See *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 11-131, MB Docket No. 07-42, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Red 11494, 11495-96, 11500-01, ¶¶ 2, 8 (2011) ("2011 Program Carriage Order and NPRM"). This order is currently on appeal in the Second Circuit. See *Time Warner Cable Inc. v. FCC*, No. 11-4138 (2d Cir.).

¹³⁷ See *2011 Program Carriage Order and NPRM*, 26 FCC Red at 11496-97, 11521-22, ¶¶ 3, 37.

55. Several commenters indicate that independent programmers have difficulty obtaining carriage on video distribution systems at reasonable terms because of increasing vertical integration in the video market.¹³⁸ Commenters suggest this increasing vertical integration has forced out independent programmers, especially those programmers who are minority-owned or offer minority-targeted programming, because vertically integrated MVPDs want to promote their own programming in order to increase revenues.¹³⁹ These commenters encourage the Commission to continue to reform the program carriage complaint process to create a “level playing field.”¹⁴⁰ Some MVPDs, on the other hand, allege that the Commission’s program carriage provisions no longer serve a useful purpose. They contend that only a small number of channels on a cable operator’s channel lineup are owned by that operator or any other cable operator. In addition, these MVPDs argue that non-affiliation is no longer the reason why independent programmers are not gaining carriage on their respective systems. Instead, the more likely reason is that the non-affiliated network is perceived by the MVPD to add little value or diversity.¹⁴¹

56. *Retransmission Consent and Must Carry.* The ability of an MVPD to offer its subscribers local broadcast programming affects its entry into the video services marketplace.¹⁴² In 1992, Congress enacted Sections 325, 614, and 615 of the Act to facilitate cable operators’ carriage of local broadcast television stations¹⁴³ and subsequently adopted a similar carriage regime for DBS providers in 1999.¹⁴⁴ Pursuant to Section 325 of the Act, MVPDs may not retransmit a local broadcaster’s signal without their express permission.¹⁴⁵ Cable operators are required to carry local television stations in every market they serve. DBS operators need not carry any local television signals, but where a DBS operator chooses to carry such stations, it must carry all stations in that market (“carry one, carry all”).¹⁴⁶ Under this regime, broadcasters maintain control over their signals and commercial broadcasters may request compensation from MVPDs for the carriage of their signals.¹⁴⁷

57. In local television markets, as defined by The Nielsen Company’s (“Nielsen’s”) designated market areas (“DMAs”),¹⁴⁸ commercial television stations must elect every three years between the right

¹³⁸ See Free Press 8/28/09 Reply at 9-10; Written Ex Parte Submission of WealthTV (filed July 23, 2009) at 1 (“WealthTV 7/23/09 Ex Parte”); HDNet 6/20/09 Reply at 1-2.

¹³⁹ See Free Press 8/28/09 Reply at 9-10; WealthTV 7/23/09 Ex Parte at 4-6.

¹⁴⁰ See Consumers Union 7/29/09 Comments at 5; WealthTV 7/23/09 Ex Parte at 1-4.

¹⁴¹ See NCTA 6/8/11 Comments at 17-18.

¹⁴² For a complete description of the retransmission consent and must-carry provisions, see *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Red 11919 (MB 2011) (“STELA Report”); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-28 (Sept. 8, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.doc (“SHVERA Report”).

¹⁴³ 47 U.S.C. §§ 325(b), 534, 535.

¹⁴⁴ The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (1999) (“SHVIA”).

¹⁴⁵ 47 U.S.C. § 325(b).

¹⁴⁶ 47 C.F.R. § 338(a)(1); 47 C.F.R. § 76.66.

¹⁴⁷ See *STELA Report*, 26 FCC Red at 11922-23, ¶ 7.

¹⁴⁸ A DMA is a Nielsen-defined television market consisting of a unique group of counties. The U.S. is divided into 210 DMA markets. Nielsen identifies television markets by placing each U.S. county (except for certain counties in Alaska) in a market based on measured viewing patterns and by MVPD distribution. Typically, each U.S. county is (continued....)

to grant retransmission consent or the right to mandatory carriage.¹⁴⁹ If a station elects retransmission consent, the broadcaster and an MVPD negotiate a carriage agreement, which may include monetary or other types of compensation in return for the right to carry the broadcast signal.¹⁵⁰ Where a station elects must carry, it is generally entitled to carriage but it is prohibited from receiving compensation.¹⁵¹ Qualified local noncommercial educational (“NCE”) stations have a right to mandatory carriage within the same must-carry market, but do not have retransmission consent rights.¹⁵² Cable operators also are permitted to negotiate for retransmission consent with any other broadcast station they seek to carry irrespective of the station’s television market.¹⁵³

58. In recent years, some MVPDs’ and broadcasters’ negotiations have resulted in public retransmission consent disputes, leading a coalition of MVPDs and consumer groups to file a rulemaking petition with the Commission in 2010.¹⁵⁴ The petitioners argue that the Commission’s retransmission consent regulations are outdated and harmful to consumers.¹⁵⁵ The Commission issued a Notice of Proposed Rulemaking in 2011 seeking comment on several proposed revisions to its retransmission consent regime.¹⁵⁶ Among other things, the Commission sought comment on modifying the good faith negotiation standards to include additional negotiation violations, revising the “totality of the circumstances” standard used to determine whether actions in the negotiation process are undertaken in good faith, and altering the consumer notice requirements for retransmission consent disputes.¹⁵⁷

59. Several commenters indicate that securing access to local and network broadcast programming is a critical component of a competitive MVPD market.¹⁵⁸ In particular, some commenters argue that the current retransmission consent regime provides each network-affiliated station with a monopoly over network programming within its local market.¹⁵⁹ This market power, commenters claim, allows broadcasters to exact substantial retransmission consent fees and to withhold such programming

(Continued from previous page)

assigned to only one market according to the market whose stations receive the preponderance of the audience in that county. Yet in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska, however, are not assigned to any DMA. See *STELA Report*, 26 FCC Red at 11921, ¶ 5 & n.10.

¹⁴⁹ 47 U.S.C. § 325(b)(3)(B); 47 C.F.R. §§ 76.56(b), 76.64.

¹⁵⁰ 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.64. See also *STELA Report*, 26 FCC Red at 11923, ¶ 8.

¹⁵¹ 47 C.F.R. § 76.60.

¹⁵² 47 U.S.C. § 325(b)(2)(A).

¹⁵³ 47 U.S.C. § 325(b); 47 C.F.R. § 76.64. These carriage arrangements might be limited though by other contractual restrictions, such as network affiliation arrangements. See *STELA Report*, 26 FCC Red at 11923, n. 22.

¹⁵⁴ See *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Red 2718, 2725-27, ¶¶ 13-16 (2011) (“*Retransmission Consent NPRM*”).

¹⁵⁵ See *id.* at 2725, ¶ 13.

¹⁵⁶ See *id.* at 2719, ¶ 1.

¹⁵⁷ See *id.* at 2729-38, ¶¶ 20-37.

¹⁵⁸ See DISH Network 6/8/11 Comments at 8; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 25-26; RCN 8/28/09 Reply at 6-7; DIRECTV 5/20/09 Comments at 17-18. Small and rural carriers also raised retransmission consent concerns, which we address in Section IV.

¹⁵⁹ See DIRECTV 6/8/11 Comments at 26; DISH Network 6/8/11 Comments at 8-9; New Jersey 7/8/11 Reply at 9; DIRECTV 5/20/09 Comments at 18.

when their terms and conditions are not met.¹⁶⁰ Consequently, they welcome the Commission's review of its retransmission consent regime and encourage the Commission to reform its regulatory framework for retransmission consent.¹⁶¹

60. NAB and broadcast station licensees urge the Commission to refrain from adopting substantial changes to the existing retransmission consent rules,¹⁶² or repealing any broadcasting-related exclusivity rules.¹⁶³ They argue that retransmission consent fees are necessary to help broadcasters sustain their ability to offer programming, particularly news that is relevant to their communities.¹⁶⁴ Furthermore, they state that historically broadcasters have not received cash compensation for their signals,¹⁶⁵ and even the fees paid by MVPDs today are significantly lower than the fees paid to cable networks with comparable or lower ratings.¹⁶⁶ NAB states that retransmission consent fees represent only a small fraction of MVPD programming costs.¹⁶⁷

61. *Exclusivity Rules.* MVPDs carry local broadcast stations pursuant to the Commission's rules protecting a broadcast station's exclusive distribution rights in its respective market.¹⁶⁸ With respect to cable operators, the Commission's network non-duplication rules allow a local broadcast station to request that the duplicated programming be blacked out when carried on another station imported by the

¹⁶⁰ See DISH Network 6/8/11 Comments at 8-9; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 26-27; Verizon 6/8/11 Comments at 18; RCN 8/28/09 Reply at 7; DIRECTV 5/20/09 Comments at 18-19.

¹⁶¹ See DIRECTV 6/8/11 Comments at 27; DISH Network 6/8/11 Comments at 9; Verizon 6/8/11 Comments at 18-20; AT&T 6/8/11 Comments at 8.

¹⁶² See NAB 6/8/11 Comments at 17-18; NAB 7/8/11 Reply, Attachment A at iii (resubmitting its comments filed in MB Docket No. 10-71). See also, e.g., CBS Television Network Affiliates Association Comments, MB Docket No. 10-71 (filed May 27, 2011) ("CBS Affiliates 10-71 Comments"); Sinclair Broadcast Group, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Sinclair 10-71 Comments"); Belo Corp. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Belo 10-71 Comments").

¹⁶³ See NAB 7/8/11 Reply, Attachment B at 53-61; CBS Affiliates 10-71 Comments at 2-3; Gilmore Comments, MB Docket No. 10-71 (filed May 27, 2011) at 16; Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 3-4; Belo 10-71 Comments at 2, 29-30.

¹⁶⁴ See, e.g., NAB 7/8/11 Reply, Attachment A at 7-10; CBS Affiliates 10-71 Comments at 1; CBS Corporation Comments, MB Docket 10-71 at 11 (filed May 27, 2011) ("CBS Corp. 10-71 Comments"); Sinclair 10-71 Comments at 14; Belo 10-71 Comments at 6.

¹⁶⁵ See, e.g., NAB 7/8/11 Reply, Attachment B at 16-17; Joint Comments of Gilmore Broadcasting Corp., Landmark Television, LLC, and Rockfleeet Broadcasting, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 6; CBS Affiliates 10-71 Comments at 15; Nexstar Broadcasting, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) at 4; The Walt Disney Company Comments, MB Docket No. 10-71 (filed May 27, 2011) at 8-9; Allbritton Communications Corporation Comments, MB Docket No. 10-71 (filed May 27, 2011) at 2.

¹⁶⁶ See NAB 7/8/11 Reply, Attachment A at 15-18; Sinclair 10-71 Comments at 11 (citing Dr. Michael G. Baumann, *Proposal for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis*, Economists Incorporated, May 27, 2011, at 7, attached as Exhibit 1 to the Sinclair Comments); CBS Affiliates 10-71 Comments at 14.

¹⁶⁷ See NAB 7/8/11 Reply, Attachment B at 2.

¹⁶⁸ See generally *SIVRA Report*, *supra*, n. 142, for a more detailed description of these rules.

system into the local station's zone of protection.¹⁶⁹ Similarly, the Commission's syndicated exclusivity rules allow a broadcaster to assert its right to black out syndicated programming for which it holds exclusive rights when carried by a cable operator within its zone of protection.¹⁷⁰ The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event occurring in a local market. The rule prevents a cable operator from providing the live sporting event on a distant signal to a market where the game is blacked out on the local broadcast station.¹⁷¹ As mandated by Congress, the Commission's network non-duplication and syndicated exclusivity rules and the sports blackout rule apply to satellite carriers.¹⁷² The Commission has sought comment on the elimination of the network non-duplication and syndicated exclusivity rules as they apply to cable¹⁷³ and on a Petition for Rulemaking requesting the Commission to eliminate the sports blackout rule.¹⁷⁴

62. *Ownership Limits.* Section 613(f) of the Act requires the Commission to establish reasonable limits on the number of subscribers a cable operator may serve nationwide ("horizontal" limit) and the number of channels a cable operator may dedicate to its affiliated programming networks ("vertical" limit).¹⁷⁵ Although the Commission adopted rules placing limitations on the horizontal and vertical ownership of cable operators,¹⁷⁶ these rules were struck down by the D.C. Circuit.¹⁷⁷

63. *Public Interest Programming.* Pursuant to Sections 611 and 621 of the Communications Act, local franchising authorities may require cable operators to dedicate a portion of their channel capacity and provide financial support to public, educational, and governmental ("PEG") channels.¹⁷⁸

¹⁶⁹ 47 C.F.R. § 76.92. For purposes of this rule, a broadcast station's zone of protection is 35 miles (or 55 miles in smaller markets). 47 C.F.R. § 73.685(m).

¹⁷⁰ 47 C.F.R. § 76.101. For purposes of this rule, a broadcast station has a 35-mile geographic zone of protection. 47 C.F.R. § 73.685(m).

¹⁷¹ 47 C.F.R. § 76.111.

¹⁷² 47 U.S.C. § 339(b); 47 C.F.R. §§ 76.122-23, 76.127. In 1999, Congress directed the Commission to extend the network non-duplication and syndicated exclusivity rules to satellite carriers, but only with respect to the retransmission of nationally distributed superstations. It also required the Commission to extend the sports blackout rules to the carriage of nationally distributed superstations and network stations. See SHVIA, P.L. No. 106-113, 113 Stat. 1501A-534.

¹⁷³ See *Retransmission Consent NPRM*, 26 FCC Red at 2740-43, ¶¶ 42-45.

¹⁷⁴ See *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, MB Docket No. 12-3, Public Notice, 27 FCC Red 260 (MB 2012).

¹⁷⁵ 47 U.S.C. § 533(f).

¹⁷⁶ See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order, 8 FCC Red 8565, 8567, ¶¶ 3-4 (1993). See also 47 C.F.R. §§ 76.503(a), 76.504(a)-(b).

¹⁷⁷ See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001). In 2008, the Commission once again adopted a horizontal limit preventing an individual cable operator from serving more than 30 percent of MVPD subscribers nationwide, using more recent empirical data to reach the result. See *The Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Red 2134, 2135, ¶ 1 (2008). The Commission also sought additional comment on its vertical ownership limit. See *id.* at 2187-96, ¶¶ 125-45. Despite the inclusion of more recent data, the D.C. Circuit struck down the revised horizontal ownership limit in 2009 for being arbitrary and capricious. See *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009).

¹⁷⁸ 47 U.S.C. §§ 531(a)-(b), 541(a)(4)(B). Comcast is subject to heightened PEG requirements after its merger with NBCU. In the *Comcast-NBCU Order*, the Commission reaffirmed the importance of PEG programming and (continued....)

The statute further requires cable operators to carry any PEG channels on their basic service tier.¹⁷⁹ In spite of these statutory requirements, some state video franchising laws have removed or reduced the PEG requirements provided in local franchising agreements, which has led to a reduction in PEG funding and support.¹⁸⁰

64. Commenters express concern with the state of public interest programming. They indicate that PEG channels have suffered in recent years due to state franchising laws, anti-competitive conduct by cable and wireless companies, and the Commission's recent changes to its franchising rules.¹⁸¹ Montgomery County, Maryland ("Montgomery County") contends that cable operators have not used advances in technology and service delivery to benefit PEG programming and that the required number of PEG channels has not kept pace with the increase in channel capacity on cable systems.¹⁸²

65. The Alliance for Community Media ("ACM") submits a study with its comments finding that, among other things, PEG Access Centers in at least 100 communities have closed since 2005.¹⁸³ In addition, the study indicates that new state franchising laws and/or decisions by local governments are the primary reasons for reductions in funding and in-kind resources for PEG Access Centers.¹⁸⁴ Based on the study, ACM argues that PEG channels will disappear without increased regulatory support.¹⁸⁵

66. Some commenters therefore encourage the Commission to issue a declaratory ruling concerning the Cable Act's carriage rules for PEG channels.¹⁸⁶ In 2009, the Commission received two petitions seeking a declaratory ruling clarifying the statutory rules and responsibilities of MVPDs with respect to the carriage of PEG channels. These petitions argue that AT&T's delivery of PEG programming on its U-verse system violates the Act. In particular, the petitioners' claim that AT&T's placement of PEG programming on a singular channel in its U-verse system is a violation of the Act

(Continued from previous page)

imposed requirements on Comcast to protect the public interest as well as preserve diversity and localism in the video services marketplace. *See Comcast-NBCU Order*, 26 FCC Rcd at 4326, ¶ 213. The conditions prohibit Comcast from migrating PEG channels to a digital tier until all channels are converted to a digital format. They require carriage of all PEG channels on Comcast's digital starter tier. Comcast may not change the method by which it delivers PEG channels if the change would result in the material degradation of signal quality or impair viewer reception of PEG channels. *See id.* at 4326-27, 4376-77, ¶ 214 & App. A, § XIV. Comcast further agreed to develop a platform for hosting PEG content On Demand and On Demand Online within three years of closing the transaction. *See id.* at 4327, 4376-77, ¶ 215 & App. A, § XIV.

¹⁷⁹ 47 U.S.C. § 543(b)(7)(A)(ii); 47 C.F.R. § 76.901(a).

¹⁸⁰ *See PEG CRS Report* at 2-3.

¹⁸¹ *See* ACM 6/8/11 Comments at 3; Anne Arundel 6/8/11 Comments at 12; Ohio Community Board 6/8/11 Comments at 2; Marin 6/8/11 Comments at 2; Oxnard Elementary 6/8/11 Comments at 2-3; Oxnard College 6/8/11 Comments at 1-2.

¹⁸² *See* Montgomery County 7/8/11 Reply at 33; Montgomery County 5/20/09 Comments at 24.

¹⁸³ *See Analysis of Recent PEG Access Center Closures, Funding Cutbacks and Related Threats* at 2, submitted with ACM 6/8/11 Comments.

¹⁸⁴ *See id.*

¹⁸⁵ *See* ACM 6/8/11 Comments at 3.

¹⁸⁶ *See* Anne Arundel 6/8/11 Comments at 12-13; New Orleans 5/20/09 Comments at 16-17.

because it results in inferior PEG channel accessibility, functionality, and signal quality in comparison to other basic and non-basic channels on AT&T's U-verse system.¹⁸⁷

67. In response, AT&T encourages the Commission not to establish federal requirements for PEG programming. It argues that the Act provides the Commission with narrow authority with respect to PEG programming. AT&T also asserts that the Act does not require the provision of PEG programming, but simply permits franchising authorities to require cable operators to set aside capacity for PEG programming.¹⁸⁸

68. With regard to DBS MVPD carriage of public interest programming, in 1992, Congress established a public interest programming requirement that requires DBS operators to dedicate between four and seven percent of their capacity to public interest programming.¹⁸⁹ Under the Commission's rules, DBS operators must reserve four percent of their channel capacity for qualified programmers providing "noncommercial programming of an educational or informational nature."¹⁹⁰ DISH Network reports providing 24 channels of public interest programming.¹⁹¹ DIRECTV carries several channels of public interest programming.¹⁹²

69. *Leased Access.* Section 612 of the Communications Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties.¹⁹³ The requirement is intended to provide competition and diversity in the delivery of video programming.¹⁹⁴

¹⁸⁷ See *Petition for Declaratory Ruling that AT&T's Method of Delivering Public, Educational and Government Access Channels over its U-verse System is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules*, MB Docket No. 09-13, Petition of ACM *et al.* (filed Jan. 30, 2009); *Petition for Declaratory Ruling on Requirements for a Basic Service Tier and for PEG Channel Capacity Under Sections 543(b)(7), 531(a) and the Commission's Ancillary Jurisdiction Under Title I*, MB Docket No. 09-13, Petition of the City of Lansing, MI (filed Jan. 27, 2009). See also *Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, MB Docket 09-13, Public Notice, 24 FCC Rcd 1340 (MB 2009). These petitions remain pending before the Commission.

¹⁸⁸ See AT&T 6/20/11 Reply at 9-10.

¹⁸⁹ 47 U.S.C. § 335(b)(1)(A). Qualified DBS providers may alter dedicated capacity to between 3.5 and 7 percent if they provide state public affairs networks to their subscribers in at least 15 states. 47 U.S.C. § 335(b)(1)(B).

¹⁹⁰ 47 C.F.R. § 25.701(f). In order to qualify, programmers need to be: (1) organized for a noncommercial, nonprofit purpose; (2) a national educational programming supplier; and (3) responsible for 50 percent of the direct costs the DBS provider occurs in making the programming available. See *id.* See also *13th Report*, 24 FCC Rcd at 652, ¶ 231.

¹⁹¹ DISH Network carries the following public interest programming channels: 3ABN, Almaxvision, Baby First, Brigham Young University, C-SPAN, Christian Television Network, Classic Arts Showcase, EWTN, Free Speech TV, HITN, Impact Network, Kids & Teens Television, KBS World, Link Media Inc., NASA Channel, Pentagon Channel, Trinity Broadcasting Network, and V-ME. See DISH Network 7/29/09 Comments at 4, n. 3. DISH Network provided updated information to Media Bureau staff on Feb. 27, 2012.

¹⁹² Among others, DIRECTV offers the following channels: World Harvest Television, C-SPAN 1 and 2, Daystar, Trinity Broadcasting Network, the WORD Network, BYU TV, LINK TV, NASA TV, TCT, Once Mexico, EWTN, HITN, NRB, MHz, V-Mc, CTN, Gem Net, Hope Channel, JLTU, Enlace, Golden Eagle Broadcasting, Free Speech TV, GOD TV, and numerous local PBS channels. See DIRECTV 6/8/11 Comments at 13.

¹⁹³ 47 U.S.C. § 532(b).

¹⁹⁴ 47 U.S.C. § 532(a).

The Commission regulates the prices, terms, and conditions for access to these channels and reviews petitions for relief from aggrieved parties.¹⁹⁵

70. Section 612 also provides that (1) “at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States” and (2) “are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.”¹⁹⁶ In previous reports, the Commission examined whether the “70-70 benchmark” had been met.¹⁹⁷ While the Commission did find in the *13th Report* that the first prong of the benchmark had been met, based on the data collected for that report, the Commission held it was less clear whether the second prong had been met.¹⁹⁸ Thus, the Commission, at that time, required cable operators to submit data to determine whether the 70-70 benchmark had been met.¹⁹⁹ In particular, the Commission stated that it would require each cable operator to submit certain information for each cable system on a zip code basis for 2006 and 2007.²⁰⁰ To implement this new data collection requirement, the Media Bureau sought comment on a proposed new form.²⁰¹ Although the Commission did initiate the Office of Management and Budget (“OMB”) approval process for that form, it did not ultimately submit the matter to OMB.²⁰² We now find, using data that is currently available to us, that incumbent cable systems’ penetration (that is, the percentage of homes passed that subscribe to cable) is declining. Specifically, the 2010 data from the Annual Report of Cable Television Systems (FCC Form 325) indicate that incumbent cable systems pass well over 70 percent of households. The FCC Form 325 data, however, also indicate that only 45.3 percent of households passed by incumbent cable systems subscribe to these systems, compared to 56.3 percent reported in the *13th Report*.²⁰³ Thus, we conclude that because the available data indicate that the second prong of the 70-70 benchmark is not met, it is not necessary to impose a new data collection

¹⁹⁵ 47 C.F.R. §§ 76.970-78. In 2008, the Commission released a Report and Order modifying the leased access rules. See *Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Red 2909 (2008). The Report and Order was stayed by the U.S. Court of Appeals for the Sixth Circuit. See *Order, United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (6th Cir. 2008). The Report and Order included rule changes requiring approval by the Office of Management and Budget which was denied on July 9, 2008. No further action has been taken by the Commission to date and the rule changes remain in abeyance.

¹⁹⁶ 47 U.S.C. § 532(g). This provision was added to the Communications Act by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

¹⁹⁷ See, e.g., *13th Report*, 24 FCC Red at 557-61, ¶¶ 33-43; *12th Report*, 21 FCC Red at 2512-15, ¶¶ 31-36.

¹⁹⁸ See *13th Report*, 24 FCC Red 559-60, ¶¶ 40-41.

¹⁹⁹ See *id.* at 560-61, ¶ 43.

²⁰⁰ Specifically, the *13th Report* identified the following information: (1) the total number of homes the cable operator currently passes; (2) the total number of homes the cable operator currently passes with 36 or more activated channels; (3) the total number of actual subscribers, including all subscribers in MDUs; and (4) the total number of subscribers with 36 or more activated channels. See *13th Report*, 24 FCC Red at 560-61, ¶ 43.

²⁰¹ See *Media Bureau Seeks Comment on a Cable Subscribership Survey for the Collection of Information Pursuant to Section 612(g) of the Communications Act*, MB Docket No. 07-269, Public Notice, 24 FCC Red 217 (MB 2009).

²⁰² See FCC, *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 4437 (2009). Before formally submitting an information collection to OMB for approval, the Commission is required to seek comments on its proposal under the Paperwork Reduction Act of 1995, P.L. 104-13 (44 U.S.C. 3506(c)(4)).

²⁰³ See also *infra*, ¶ 142 & Table 6 (showing a similar decline based on SNL Kagan data).

requirement on all cable operators regarding this subject. Accordingly, we will not require cable operators to provide the data requested in the *13th Report* or pursue approval of this proposed reporting requirement.²⁰⁴

71. *Access to Multiple Dwelling Units.* At one time, competitive MVPDs faced difficulty obtaining access to multiple dwelling units (“MDUs”) due to long-term exclusive contracts between building owners and incumbent providers.²⁰⁵ The Commission addressed this concern in 2007 by adopting rules to prevent the use of exclusive contracts for the provision of video services to MDUs and other centrally managed residential real estate developments.²⁰⁶ In particular, the Commission prohibited the enforcement of existing exclusivity clauses and the execution of new ones by cable operators, common carriers, and OVSS.²⁰⁷ The Commission found that exclusivity clauses were a barrier to both new entry into the MVPD marketplace and to broadband deployment, as well as an unfair act under Section 628(b).²⁰⁸

72. *Inside Wiring.* Pursuant to Section 624(i) of the Act, the Commission promulgated rules providing subscribers with the opportunity to purchase the wiring inside their homes after the termination of cable service and before the removal of such wiring.²⁰⁹ The Commission later adopted rules which (1) provided for the sale, or transfer, of “home run” wiring in an MDU by an incumbent provider who is ceasing provision of service; (2) gave competitive MVPDs access to molding in an MDU that contains wiring of an incumbent provider for installation of the competitive MVPD’s inside wiring; and (3) gave subscribers access to existing inside wiring prior to the termination of service in order to avoid interruptions in service.²¹⁰ In 2007, the Commission issued a Report and Order and a Declaratory Ruling

²⁰⁴ This decision does not affect the data collection requirements of FCC Form 325, to which cable operators remain subject.

²⁰⁵ See, e.g., *13th Report*, 24 FCC Red at 660-62, ¶¶ 250-54; *12th Report*, 21 FCC Red at 2597, ¶¶ 207-08. These long-term exclusive contracts were especially harmful to competition given that 30 percent of Americans lived in MDUs in 2007, with that figure predicted to increase over time. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Red 20235, 20235-36, ¶ 1 (2007) (“*MDU Order and FNPRM*”), *aff’d sub nom. Nat’l Cable & Television Ass’n v. FCC*, 567 F.3d 659 (2009).

²⁰⁶ See *MDU Order and FNPRM*, 22 FCC Red at 20235-36, 20238, ¶¶ 1-2, 7. See also 47 C.F.R. § 76.2000. In 2010, the Commission released a Second Report and Order building on its *MDU Order and FNPRM*. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Red 2460 (2010). In this Second Report and Order, the Commission determined that MVPDs are permitted to use bulk billing arrangements – those arrangements in which one MVPD offers video service to every resident of an MVPD at a substantial discount than what each individual resident would pay if he or she contracted with the MVPD individually. See *id.* at 2463-71, ¶¶ 10-28. In addition, the Commission determined that MVPDs are allowed to enter exclusive marketing agreements with MDU owners. See *id.* at 2471-73, ¶¶ 29-37.

²⁰⁷ See *MDU Order and FNPRM*, 22 FCC Red at 20251, ¶ 30.

²⁰⁸ See *id.* at 20248-49, ¶¶ 26-27. The pending Further Notice of Proposed Rulemaking seeks comment on extending the MDU exclusivity ban to DBS providers, private cable operators, and other MVPDs not subject to Section 628. See *id.* at 20264, ¶¶ 61-62.

²⁰⁹ 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.801-02. See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Red 1435 (1993).

²¹⁰ 47 C.F.R. §§ 76.804-06. See also *Telecommunications Services Inside Wiring: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184; MM (continued....)

that classified inside wiring behind sheet rock as physically inaccessible given the significant cost and physical damage to accessing wiring behind sheet rock, thereby facilitating the transfer of the ownership of that wiring when an incumbent provider is ceasing service.²¹¹

73. *Over-the-Air Reception Devices.* Pursuant to the Act, the Commission has adopted a rule preempting restrictions that impair viewers from receiving video services using over-the-air reception devices ("OTARD").²¹² The rule applies to direct broadcast satellite antennas that are one meter or less in diameter, or any size in Alaska; antennas that are one meter or less in diameter or diagonal measurement and are designed to receive or transmit either video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or fixed wireless signals other than via satellite; and antennas designed to receive television broadcast signals.²¹³ For the rule to apply, the antenna must be installed "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property."²¹⁴ The rule prohibits restrictions impairing the installation, maintenance, or use of antennas to receive video programming on property within the exclusive control of the antenna user.²¹⁵ The rule bars restrictions that: (1) unreasonably delay or prevent installation, maintenance, or use; (2) unreasonably increase the cost of installation, maintenance, or use; and (3) preclude reception or transmission of an acceptable quality signal.²¹⁶ DBS operators maintain that continued enforcement of this rule is critical to ensuring their competitiveness in the video market.²¹⁷

(ii) Market Conditions Influencing Entry

74. In addition to regulatory conditions, a number of market conditions may also influence if, and when, entry occurs. Economies of scale, capital requirements, and the reaction of competitors to new entrants all affect a firm's ability to enter into a market. Economies of scale appear to produce cost advantages, especially with respect to the cost of acquiring programming and consumer premise equipment,²¹⁸ and thus may play a major role in profitability and the willingness to enter the MVPD (Continued from previous page)

Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997). "Home run" wiring is the wiring which runs from just outside an MDU resident's unit back to that point where the provider's wiring becomes devoted to that resident. 47 C.F.R. § 76.800(d).

²¹¹ See *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring: Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, CS Docket No. 95-184, MM Docket No. 92-260, WC Docket No. 01-338, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640, 10646-61, ¶¶ 12-47 (2007), *aff'd sub nom. Nat'l Cable & Television Ass'n v. FCC*, No. 07-1356, 2008 WL 4808911 (D.C. Cir. Oct. 23, 2008).

²¹² 47 U.S.C. § 303 note. See also Telecommunications Act of 1996, Pub. L. No. 104-04, § 207, 110 Stat. 56, 114 (1996) ("1996 Act").

²¹³ 47 C.F.R. § 1.4000(a)(1)(i)-(iii).

²¹⁴ 47 C.F.R. § 1.4000(a)(1).

²¹⁵ *Id.* The antenna user must have a direct or indirect ownership interest, or leasehold interest, in the property. *Id.*

²¹⁶ 47 C.F.R. § 1.4000(a)(3).

²¹⁷ See DISH Network 6/20/09 Reply at 9-10; DIRECTV 5/20/09 Comments at 23-24. DIRECTV and DISH Network have petitioned the Commission for a declaratory ruling on the legitimacy of a Philadelphia ordinance restricting the placement of satellite dishes. See *Media Bureau Seeks Comment on Petition for Declaratory Ruling That An Ordinance of the City of Philadelphia, Pennsylvania is Preempted By The Commission's Over-The-Air Reception Device Rule*, CSR-8541-O, Public Notice, 26 FCC Rcd 16074 (MB 2011).

²¹⁸ For a discussion of market-based conditions that influence entry, see Porter, *supra* n. 19, at 7-17.

industry. Capital requirements, especially large fixed costs, and first-mover advantages, may also influence if and when MVPD entry takes place. The expected reaction from existing competitors, especially in terms of price competition, also influences entry.²¹⁹ Each of these elements is discussed in turn below.

75. *Economies of Scale.* The term “economies of scale” refers to the situation where there is a decline in unit costs as the total number of units per period increases. Economies of scale may deter entry if new MVPDs must enter the market at a large scale in order to obtain cost advantages similar to incumbent MVPDs.²²⁰ Statements from MVPDs suggest that scale economies affect the cost of acquiring programming and consumer premise equipment, such as set-top boxes. In their reports to shareholders, some MVPDs emphasize the value of scale economies. For example, Comcast stressed the importance of achieving scale in both content and distribution in its transaction with NBC-Universal.²²¹ When discussing the rising cost of video programming, DIRECTV explained that the company would manage increasing costs of programming by continuing to use its considerable scale to leverage fair deals for programming at the negotiating table.²²² On the other hand, the American Cable Association (“ACA”) calls attention to the higher prices paid for video programming by small cable operators that lack scale economies.²²³

76. *Capital Requirements.* The need to invest large financial resources in order to compete may also influence MVPD entry, especially in a mature market where most customers wanting MVPD service already subscribe to an MVPD. Large fixed costs and an entrant’s recognition that most of its subscribers would need to switch from an incumbent MVPDs may delay the entrance of a new MVPD. For example, Verizon explained that it expected to invest \$23 billion from 2004 to 2010 deploying its FiOS network.²²⁴

77. *First Mover Advantages.* First mover advantages may represent another condition influencing entry.²²⁵ Years of advertising and customer relationships may provide incumbents with a degree of brand identification and customer loyalty.²²⁶ Entrants must often spend heavily to win customers from incumbents, which often involves start-up losses and takes an extended period of time.²²⁷ Given the maturity of the MVPD market, new MVPDs recognize that they must win customers from incumbents.²²⁸ If it costs more to get a subscriber to switch than it costs the incumbent to get the customer initially, this constitutes a first-mover advantage that deters entry.

²¹⁹ *Id.* at 17-23.

²²⁰ *Id.* at 7-9.

²²¹ Comcast, 2010 Annual Review, Letter to Shareholders at 1.

²²² DIRECTV, 2010 Annual Report, Message to Shareholders.

²²³ ACA 7/29/09 Comments at 2, 11-12.

²²⁴ Verizon 5/20/2009 Comments at 6.

²²⁵ For a discussion of first-mover advantages, see David Montgomery & Marvin Lieberman, *First-Mover Advantages*, STRATEGIC MANAGEMENT JOURNAL, Summer 1988, at 41-58.

²²⁶ Porter at 9.

²²⁷ *Id.*

²²⁸ DISH Network says that “as the pay-TV industry matures, we and our competitors increasingly must seek to attract a greater proportion of new subscribers from each other’s existing subscriber bases rather than from first-time purchasers of pay-TV services.” DISH Network 2010 Form 10-K at 42.

78. *Reaction from Existing Competitors.* A potential entrant's expectations regarding the reaction from incumbent MVPDs may influence entry. For instance, the possibility of "predatory pricing," where an incumbent lowers price in an effort to discourage entry or drive an entrant from the market before it can establish itself, may inhibit market entry.²²⁹ Statements from analysts in the MVPD industry suggest, however, that incumbents and entrants prefer to avoid price wars and compete on other features of the MVPD service.²³⁰

e. Recent Entry

79. There are different types of entry in the MVPD market and each has a potentially different impact on competition in market for the delivery of video programming. Meaningful entry that substantially increases competition requires bringing new capacity, upgraded capacity, or efficiencies into the market with a desire to gain market share.²³¹ The deployment of video delivery systems by new MVPDs has had the most impact on competition in the MVPD market. The deployment of new video delivery systems by AT&T U-verse and Verizon FiOS are recent examples of this type of entry. Another type of entry involves the acquisition of an existing video delivery system followed by investment to upgrade the system. Although this type of entry does not, by itself, increase the number of competitors, investments to upgrade an existing video system contributes to a strengthening of competition by adding capacity and changing the technology to provide more channels and advanced video services, such as digital television, HD, VOD, and DVR. The acquisition of Adelphia by Comcast and Time Warner Cable in 2005 is an example of this type of entry.²³² Entry that involves buying an existing video system but not investing in new capacity or changing the way the company operates will have the least impact on competition. This type of entry does not increase the number of competitors or otherwise strengthen competition. The various types of entry highlight the view that it is investment in new capacity, upgrading existing capacity, or elevating efficiency that provides meaningful entry.

²²⁹ For a discussion of predatory pricing, see, Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000), <http://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPrincetonDP.pdf> (visited Jan. 17, 2012).

²³⁰ See, e.g., David Roisen, *Investor Concerns of Pay-TV Price Wars are Overblown, Say Analysts*, SNL Kagan, Oct. 16, 2008, <http://www.snl.com/interactivex/article.aspx?id=8538777&KPLT=6> (visited Jan. 17, 2012). In the article, Sanford C. Bernstein analyst Craig Moffett said, "I've been hearing about the probability of price wars in this sector forever and ever and ever," and Insight Research Corp. analyst and president Bob Rosenberg, said "Price wars are always possible, but it's not clear what the precipitating event would be . . .". Mr. Rosenberg expressed his belief that price is unlikely to become the main point of contention among pay-TV competitors anytime soon. See also, John Eggerton, *Whitacre Sees No Video Price War*, BROADCASTING & CABLE, June 2, 2006, <http://www.broadcastingcable.com/article/104399-Whitacre-Sees-No-Video-Price-War.php> (visited Jan. 17, 2012). In the article, AT&T Chairman Edward Whitacre tried to assure Wall Street that "the entry of telcos into the video space would not lead to price cuts in video service." Mr. Whitacre said "I don't think there's going to be a price war. I think it's going to be a war of value and of services."

²³¹ Porter at 7.

²³² Comcast and Time Warner Cable claimed that they would upgrade Adelphia's systems to enable the delivery of new or improved advanced services and to speed and expand the rollout of advanced services that already have been introduced. 2006 *Adelphia, Comcast, Time Warner Cable MO&O*, 21 FCC Red at 8310-16. ¶¶ 246-262. Adelphia's cable systems are being upgraded but the process has taken longer than Comcast executives hoped, according to Marc Goodman, a Comcast spokesman. See Jon Chesto, *Comcast's Adelphia Conversion is Taking Longer than Expected to Complete*, THE PATRIOT LEDGER, Sept. 4, 2010, <http://blogs.wickedlocal.com/massmarkets/2010/09/04/comcasts-adelphia-conversion-is-taking-longer-than-expected-to-complete/#axzz1nc2ejUMN> (visited Feb. 27, 2012).

80. Since the last report, the deployment of MVPD systems by AT&T and Verizon had the most significant impact on competition in the MVPD market.²³³ This type of entry, however, is rare when compared to the number of transactions involving the buying and selling of existing MVPD systems. Although most transactions do not change the number of competitors, some have resulted in MVPD system upgrades. In addition, a number of acquisitions stem from cable MVPD efforts to shed geographically disparate systems and grow regional clusters of systems.²³⁴

81. *Cable MVPD Transactions.* In previous reports, we have provided information regarding cable transactions.²³⁵ Although the buying and selling of MVPD properties does not necessarily affect competition, transactions provide useful information regarding the value of different MVPD properties. According to SNL Kagan, cable mergers and acquisitions reveal that the marketplace places a premium on larger-sized cable systems, on systems with dense footprints, systems that have been upgraded, and systems with a high penetration of Internet access services.²³⁶

82. In 2006, cable merger and acquisition activity was the slowest since 1990. The cable systems sold in 2006 involved approximately 500,000 subscribers and the total value of the transactions was \$1.6 billion – only five percent of the 2005 total.²³⁷ Most of the transactions in 2006 involved small rural cable systems.²³⁸ These systems sold at prices that reflected 9.3 times cash flow and the average value per subscriber was \$2,794.²³⁹

83. The cable systems sold in 2010 involved approximately almost 1.6 million subscribers and the total value of the transactions was \$5.4 billion.²⁴⁰ Merger and acquisitions among smaller rural cable systems continued to make up the majority of the transactions in 2010.²⁴¹ Almost two-thirds of these transactions involved cable systems with fewer than 5,000 subscribers and these systems sold at an average price of \$1,762 per subscriber, which was down from 2006 but up from the 2009 low of \$635.²⁴² Transactions involving cable systems with 5,000 to 10,000 subscribers sold at an average price of \$2,538 per subscriber, transactions involving systems with 50,000 to 100,000 subscribers sold at an average price of \$3,068 per subscriber, and transactions involving systems with 100,000 to 500,000 subscribers sold at an average price of \$3,904 per subscriber.

²³³ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 7-8.

²³⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 91.

²³⁵ See, e.g., 13th Report, 24 FCC Rcd at 565-66, ¶ 49 & Table 6.

²³⁶ For example, SNL Kagan data show that, over the 10-year period from 2000 to 2010, cable transactions for systems with fewer than 100,000 subscribers sold for prices that reflect 8.9 to 9.9 times cash flow while cable transactions for systems larger than 100,000 subscribers sold for prices that reflect 12.6 to 15 times cash flow. Similarly, the average value per subscriber for systems with fewer than 100,000 subscribers ranged from \$1,700 to \$2,800 while the average value per subscriber for systems with between 100,000 and 500,000 subscribers averaged \$3,842 and the average value per subscriber for systems with over 500,000 averaged \$4,214. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

²³⁷ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

²⁴¹ *Id.*

²⁴² *Id.*

84. SNL Kagan explains that there has been a steady increase in cable system values as cable MVPDs have transitioned from video services to a combination of video, Internet, and telephone services, which provide a diversified revenue stream and higher revenue per subscriber.²⁴³ Other SNL Kagan data, however, show that the average price per subscriber in all cable MVPD mergers and acquisitions has been erratic.²⁴⁴ One explanation for the variance in the average price per subscriber is that the metric is sensitive to the inclusion or the absence of mergers and acquisitions of large cable systems. Stated differently, in years where no large cable systems are traded, the average price per subscriber reflects the value of smaller cable systems. And in years where large cable systems are traded, the average price per subscriber reflects the value of large systems. In short, the buying and selling of large cable systems in any given year heavily influences the average price per subscriber and, as noted above, large cable systems trade at a premium, relative to small cable systems.

3. MVPD Conduct

85. In addition to industry structure, a second key element of our analysis of MVPD competition is an examination of the conduct of MVPDs – in particular, the business models and competitive strategies of MVPDs. MVPDs choose from a variety of business models and competitive strategies to attract and retain subscribers and generate profits. In this section of the Report, we discuss MVPD competition in terms of both price and non-price rivalry. We then provide an overview of the current business models and competitive strategies of a sample of MVPDs.

a. Price Rivalry

86. Pricing represents one component of every MVPDs' competitive strategy. Some MVPDs market themselves as "premium" services while others market themselves as "value" services. In recent years, MVPDs have offered low introductory or promotional prices for delivered video services or bundles of video, Internet access, and voice services to attract new subscribers. Over time, MVPDs have altered their pricing in response to changes in the competitive landscape. For example, with a maturing MVPD market, some of the largest MVPDs have begun experimenting with both higher-priced and lower-priced video packages.²⁴⁵

87. Today, the largest and most mid-sized MVPDs offer one or more high-end pricing plans that include hundreds of channels and a complement of HD, DVR, VOD services, and some mix of premium channels. In addition, these MVPDs offer one or more mid-priced video service plan that includes fewer channels and a smaller complement of video services. MVPDs offer, but are less likely to market, lower-priced video service plans with fewer channels and few, if any, additional video services.²⁴⁶ An MVPD may charge different prices in the different cities and towns it serves. These differences may reflect system upgrades or differences in the number of channels or advanced video services offered from one city to the next. They also may reflect differences in the number of competitors or differences in the competitive strategies used by competitors from one city to the next.

²⁴³ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

²⁴⁴ The average price per subscriber for all cable merger and acquisition activity was \$2,811 in 2006, \$3,378 in 2007, \$1,593 in 2008, \$1,981 in 2009, and \$3,451 in 2010. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 93.

²⁴⁵ Time Warner Cable in 2010 began targeting higher-end demographics with an enhanced bundle of video, Internet access, and telephone services; and a video-only service targeting budget-conscious homes. Time Warner Cable, *SEC Form 10-K for the Year Ended December 31, 2010*, at 6 ("Time Warner Cable 2010 Form 10-K").

²⁴⁶ Marketing includes the information prominently displayed on the MVPD's website. Our review of the websites of a number of MVPDs suggests that it is often much easier to find the higher-priced video service plans than it is to find the lowest price video service plan offered by the MVPD.

88. *Discounts for New Subscribers.* One of the most common pricing strategies among MVPDs takes the form of discounts for new subscribers. For example, DISH Network explains that it often offers free programming and/or promotional pricing during introductory periods for new subscribers.²⁴⁷ Typically, these new subscriber discounts are for a limited time (e.g., six months or a year) and often include additional video services (e.g., premium channels) or bundles of video, Internet access, and telephone service. At the end of introductory period, promotional materials usually indicate that prices will rise to the “normal” price. Similarly, DIRECTV offers five video packages ranging from \$29.99 per month to \$89.99 per month for 12 months after rebate with a 24-month agreement.²⁴⁸ According to DIRECTV, the offer is available only to new customers and represents a savings of \$35 per month for the first year and \$20 per month in the second year.²⁴⁹ A promotion by Verizon offers FiOS TV Prime HD, Internet (15/5 Mbps), and unlimited calling for \$89.99 per month with a two-year contract.²⁵⁰ According to Verizon, the offer is available only to new customers and represents a savings of \$600 over the two-year period.²⁵¹ Cox offers new customers who order online a bundle of video, Internet access, and telephone services for \$90 per month for 12 months.²⁵² The offer is available only to new customers and the regular price of \$147.97 per month applies after the 12 month promotional period. According to Cox, this offer represents a first-year savings of \$695.64. The above examples are snapshots and may not reflect current service offerings and prices available to new subscribers. MVPD advertisements typically state that prices rise at the end of the promotional period. For example, a Cox advertisement offers new customers a video service for \$39 for six months. The advertisement states, “After six months, then current rates apply.”²⁵³ Although cable MVPDs show their current rates and prices, some existing subscribers may be paying less than those shown. In statements to shareholders, DISH Network states that it has incurred significant costs to retain existing customers, mostly by upgrading their equipment to HD and DVR receivers.²⁵⁴ In certain circumstances, DISH Network also has offered free programming and/or promotional pricing for limited periods for existing customers in exchange for a contractual commitment.²⁵⁵

b. Non-Price Rivalry

89. Central to every MVPD business model is its selection of the technology the company will use to deliver video programming. As described below, in the MVPD industry, the primary technologies available are coaxial cable, spectrum, and most recently xDSL and fiber. Within these parameters MVPDs have adopted various competitive strategies that include transition to digital service,

²⁴⁷ DISH Network 2010 Form 10-K at 4.

²⁴⁸ DIRECTV, http://www.directv.com/DIVAPP/new_customer/base_packages.jsp?footernavtype=-1 (visited Feb. 10, 2012).

²⁴⁹ *Id.*

²⁵⁰ Verizon, http://program.verizon.com/offers/mlp.aspx?pattern=fiosTv_Triple&CMP=KNC-CON_ZZZ_FI_ZZR_Z353&bkw=verizon-fios+and+tv&se=Bing&009=e&004=383370664&005=9618581188&011=verizon-fios+tv&006=1059372363&002=2181541 (visited Feb. 10, 2012).

²⁵¹ *Id.*

²⁵² Cox, https://secure.cox.com/Service/Store/OrderNow.aspx?camcode=tile-bundle_1_browse (visited Feb. 10, 2012).

²⁵³ Cox, http://ww2.cox.com/residential/northernvirginia/pricing-and-special-offers/tv-deal.cox?camcode=rl_tv_tv-deal_splash_010312_btn_nva_1#promo-terms (visited Feb. 26, 2012).

²⁵⁴ DISH Network 2010 Form 10-K at 4.

²⁵⁵ *Id.* Data on DISH Network’s free programming or promotional prices for existing customers is not available.

product differentiation, delivery of video to diverse geographic locations, delivery of video to a variety of in-home or mobile devices, and implementation of marketing tactics.

90. Each specific technology has its own set of incumbent advantages and disadvantages. Moreover, technologies change over time and the competitive advantages of one technology may fade as new technologies are introduced. Originally, the MVPD market was defined by coaxial cable. When DIRECTV and DISH Network began offering MVPD service in the 1990s, the digital DBS systems provided significantly greater channel capacity compared to existing analog cable systems.²⁵⁶ Cable MVPDs responded to DBS's technology lead by upgrading their cable systems.²⁵⁷ These upgrades included incorporating more optic fiber into their coaxial network and transitioning from analog to digital technology.²⁵⁸ More recently, Verizon built a fiber-to-the-home system and transitioned to all digital technology.²⁵⁹ DBS technology continues to successfully deliver linear video programming, but the DBS MVPDs acknowledge that their systems cannot deliver VOD services and other two-way services like Internet access and telephone services that play an ever larger role in the business models of MVPDs.²⁶⁰

91. As a significant competitive strategy, cable MVPDs are replacing their analog video services and transitioning to all-digital video services. Comcast, for example, has been reclaiming bandwidth from analog video services to deliver more digital channels and more HD channels. By June 2011, Comcast had transitioned its expanded basic tier analog channels to digital in 85 percent of its footprint.²⁶¹ Subscribers with analog televisions use a set-top box with a digital terminal adapter to convert digital signals to analog signals.

92. Some cable operators are implementing another competitive strategy, the deployment of switched digital video ("SDV") as a solution for near-term capacity concerns.²⁶² Rather than broadcasting all available channels to viewers at once, SDV combines the bandwidth efficiencies of compressed digital content with switching to enable content to be streamed to viewers only upon request.²⁶³ Time Warner Cable explains that this technology expands network capacity by transmitting only those digital video channels that are being watched within a given grouping of homes at any given moment.²⁶⁴ According to Time Warner Cable, it is unlikely that all channels are being watched at all times within a given group of

²⁵⁶ NCTA 6/8/11 Comments at 3.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 3-4.

²⁵⁹ Verizon began offering FiOS services using both analog and digital technologies but transitioned to all-digital technology in 2008. Verizon 5/20/09 Comments at 7.

²⁶⁰ DIRECTV discusses the risk factors associated with competing in the MVPD industry against cable and telephone MVPDs and other land-based systems that have the ability to offer video, Internet, telephone, and other two-way services. DIRECTV 2010 Form 10-K at 17. DIRECTV and DISH Network have cooperative arrangements with telephone and broadband companies to provide Internet access and telephone service. These arrangements, however, are typically with telephone and broadband companies that do not offer video services in the same geographic area. For example, DIRECTV typically has cooperative arrangements with Verizon to provide Internet access and telephone service where Verizon offers DSL and not in areas where Verizon offers FiOS TV. Verizon, <http://www.22.verizon.com/home/directv/#packages> (visited Feb. 26, 2012).

²⁶¹ Although the expanded basic tier is being converted from analog to digital, the basic tier remains analog. Comcast 6/8/11 Comments at 9, 17.

²⁶² NCTA 5/20/09 Comments at 37.

²⁶³ Cox 8/28/09 Reply at 12.

²⁶⁴ *Id.*

homes, so SDV technology can free up capacity for other uses, including additional channels, more VOD offerings, and faster Internet connections.²⁶⁵ The cable industry and TiVo collaborated in the development of a tuning adaptor to enable the two-way tuning of switched digital video signals for a “one-way” TiVo device.²⁶⁶

93. Industry sources predict that SDV may pass 90 million homes by the end of 2012.²⁶⁷ Time Warner Cable has deployed switched digital video in all of its service areas²⁶⁸ and BrightHouse has deployed SDV across some of their systems.²⁶⁹ SDV was available in 68 percent of Charter’s footprint as of June 2011.²⁷⁰ The Commission has required cable operators to support SDV reception on retail devices.²⁷¹ In Northern Virginia, Cox has implemented SDV technology adding 24 new high-definition channels and 27 additional standard-definition channels.²⁷² Comcast, however, has conducted some tests but recently decided to put further SDV deployments on hold.²⁷³

²⁶⁵ *Id.*

²⁶⁶ NCTA 8/28/09 Reply at 12-14.

²⁶⁷ Jeff Baumgartner, *Cable SDV Makes Bid for a Tech Renaissance*, LR Cable News Analysis, Oct. 12, 2010, http://www.lightreading.com/document.asp?doc_id=198361&site=lr_cable (visited Oct. 25, 2011).

²⁶⁸ BigBand Networks, *BigBand’s SDV Reaches More than 39 Million Households* (press release), May 18, 2011.

²⁶⁹ Time Warner Cable 2010 Form 10-K at 2.

²⁷⁰ *Charter Loses More Video Subs, Widens Loss in Q2*, CED NEWS, Aug. 2, 2011, <http://www.cedmagazine.com/news/2011/08/charter-loses-more-video-subs-widens-loss-in-q2> (visited Nov. 10, 2011).

²⁷¹ *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System; Cable One, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80; PP Docket No. 00-67; File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; CSR-8080-Z, Third Report and Order and Order on Reconsideration, 25 FCC Red 14657, 14665-66, ¶¶ 14-15 (2010) (“*Navigation Devices Third Report and Order*”). Early issues centered on compatibility with third-party, unidirectional CableCARD devices needed to perform the signaling required to enable SDV. NCTA 8/28/09 Reply at 12-14. In June 2009, the Commission vacated Notices of Liability relating to Time Warner’s and Cox’s SDV implementation of programming previously delivered using CableCARD equipped unidirectional digital cable products (UDCPs). *See Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System*. File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; Order on Review, 24 FCC Red 8716 (2009) (vacating forfeiture orders).

²⁷² Cox 8/28/09 Reply at 12-13.

²⁷³ Jeff Baumgartner, *Comcast Back-Burners SDV (Again)*, LIGHT READING CABLE, Feb. 1, 2011, http://www.lightreading.com/document.asp?doc_id=203902&site=lr_cable (visited Jan. 15, 2012). Comcast did not elaborate on its reasons or what other bandwidth management technologies it may be considering. *Id.*

94. Corporate annual reports suggest that product differentiation has been, and remains, a key factor for competing in the market for delivered video programming.²⁷⁴ For instance, an MVPD might offer a unique video product that a rival MVPD cannot or does not provide. DIRECTV offers the NFL Sunday Ticket where subscribers can watch every out-of-market professional football game in HD. In its advertising, DIRECTV states that, “You won’t find anything like it with DISH Network or cable ... It’s available only on DIRECTV.”²⁷⁵ Some MVPDs highlight better-value or low-price video packages. DISH Network maintains that it offers better value, and claims that, “DIRECTV can’t compare with DISH Network’s everyday low price.”²⁷⁶ Argent Communications, a cable operator in New Hampshire with 2,500 subscribers, highlights cable at “affordable rates” with lifeline and basic video service listed before higher-priced digital video service.²⁷⁷ Commonly, an MVPD claims to offer more channels or more channels of a specific type than its rivals. For example, DIRECTV claims to offer the most full-time HD channels.²⁷⁸ Verizon, on the other hand, claims that FiOS TV offers more children’s, sports, and premium movie channels than cable.²⁷⁹ MVPDs further attempt to differentiate their products by claiming their products have superior quality. For example, Verizon FiOS claims that it offers brilliant HD picture quality in almost any kind of weather: “Simply put, it’s the best HDTV experience you can get.”²⁸⁰ Some MVPDs highlight bundles of video, Internet access, and telephone services while other MVPDs focus their marketing on video packages. The two DBS MVPDs focus their marketing on video services, in part, because the satellite technology they use for delivering video programming limits their ability to provide non-video (*i.e.*, Internet and telephone) services. The major cable and telephone MVPDs focus their marketing on bundled video, Internet access, and telephone. Their emphasis usually is that bundles offer better prices for consumers, relative to individual service offerings.

95. Another component of a MVPD’s business model is the choice of where the company will offer delivered video programming. The two DBS MVPDs offer delivered video programming nationwide.²⁸¹ In contrast, cable and telephone MVPDs vary widely in the geographic areas and populations covered by their systems. Some offer delivered video programming in multiple states and multiple large cities. For example, at the end of 2010, Verizon offered FiOS video services to approximately 60 percent of its wireline footprint.²⁸² Other MVPDs specialize in a region of the country

²⁷⁴ MVPDs typically refer to the importance of product differentiation in their business strategies. *See, e.g.*, DIRECTV 2010 Form 10-K at 4; DISH Network 2010 Form 10-K at 1.

²⁷⁵ DIRECTV, <http://www.directv.com/DTVAPP/content/sports/nfl?footernavtype=-1&lpos=header> (visited Oct. 24, 2011).

²⁷⁶ DISH Network, <http://www.dishnetwork.com/compare/> (visited Oct. 24, 2011).

²⁷⁷ Argent Communications, <http://www.argentcommunications.com/> (visited Oct. 24, 2011).

²⁷⁸ DIRECTV, <http://www.directv.com/DTVAPP/content/directv/programming> (visited Oct. 24, 2011).

²⁷⁹ Verizon, <http://www22.verizon.com/home/fios/v/> (visited Jan. 15, 2012).

²⁸⁰ Verizon, <http://www22.verizon.com/Residential-FiOSTV/Overview.htm#features> (visited Oct. 26, 2011).

²⁸¹ DIRECTV explains that it provides the same programming packages, at the same rates, in Alaska and Hawaii as it provides in the contiguous 48 states. However, subscribers in Alaska and Hawaii must use slightly larger dishes than customers in the contiguous 48 states. DIRECTV 6/8/2011 Comments at 13-14. DISH Network offers local broadcast stations in all 210 markets, including Alaska and Hawaii. DISH Network 7/29/2009 Comments at 6; DIRECTV 6/8/2011 Comments at 2. *See also* DishNow, <http://www.dishnow.com/alaska.html>; <http://www.dishnow.com/hawaii.html> (visited Mar. 14, 2012).

²⁸² Verizon 6/8/11 Comments at 6. According to the company’s FCC Form 477 for December 31, 2010, Verizon’s wireline footprint includes households in 13 states and the District of Columbia.

or an even smaller geographic area. For example, BendBroadband, a cable MVPD, provides delivered video programming to 12 communities in Central Oregon.²⁸³

96. One of the newest forms of product differentiation is known as the “TV Everywhere” initiative, which allows consumers to access both linear video programming and VOD programs on a variety of in-home and mobile Internet-connected devices. At its inception, TV Everywhere embodied the MVPD industry’s attempt to compete with online video offered by others.²⁸⁴ TV Everywhere is evolving, however, into a competitive strategy that MVPDs use to differentiate themselves from their rivals.²⁸⁵ Some MVPDs, such as Comcast, Cox, and AT&T, permit non-subscribers to access a subset of video content online. Other MVPDs, such as Time Warner Cable and Verizon, permit only their MVPD subscribers to access their TV Everywhere content.²⁸⁶ Both DBS MVPDs also have TV Everywhere strategies. In 2010, DIRECTV began offering the “NFL Sunday Ticket To-Go” for the first time on the iPad.²⁸⁷ TV Everywhere is new, and the amount of MVPD content available and the number of devices that can receive TV Everywhere content are rapidly increasing.²⁸⁸ For example, some MVPDs recently began offering streaming of live programs to iPads while devices are in subscribers’ homes.²⁸⁹

97. VOD and DVR services represent another noticeable difference in the marketing of MVPDs. With respect to VOD, some highlight thousands of VOD movies and television shows in their libraries while others simply mention that they offer VOD. With respect to DVR service, some MVPDs call attention to their whole-home DVR, which allows subscribers to view recorded video programs on multiple televisions throughout a house. For example, AT&T U-verse offers a DVR that can record up to 65 hours of HD content, record and play back programs from any room, pause a recorded show in one room and pick it up in another, and can be programmed remotely from a computer or wireless phone.²⁹⁰ Time Warner Cable offers a DVR that enables subscribers to restart a program already in progress.²⁹¹ Cablevision offers a DVR service that enables subscribers to record programs that are stored on Cablevision’s servers instead of storing the programs on the hard drive within the DVR cable box.²⁹²

98. The language an MVPD uses to market its delivered video programming suggests the identity of the other MVPDs it perceives to be its closest rivals. For example, in its marketing, DIRECTV

²⁸³ BendBroadband, http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci (visited Nov. 2, 2011).

²⁸⁴ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3 & 5.

²⁸⁵ *Id.* at 5.

²⁸⁶ MVPDs that wish to restrict access to their online TV Everywhere video programming use an authentication process that requires MVPD subscribers to provide a user ID and password.

²⁸⁷ DIRECTV, *2010 Annual Report*, Message to Shareholders.

²⁸⁸ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3-6.

²⁸⁹ See, e.g., DIRECTV, http://www.directv.com/DIVAPP/content/technology/mobile_apps_ipad (visited Mar. 2, 2012); Cablevision, http://optimum.cushelp.com/app/answers/detail/a_id/2694/kw/ipad%20streaming (visited Mar. 2, 2012).

²⁹⁰ AT&T, <http://www.att.com/shop/tv/#fbid=h2tVPdbtUKLw> (visited Jan. 20, 2012).

²⁹¹ Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/startover.html> (visited Mar. 2, 2012).

²⁹² Cablevision, http://optimum.cushelp.com/app/answers/detail/a_id/2580/kw/DVR%20Plus/session/L3RpbWUwMTMzMjcwODYzMjQ5ZaWQvZ0xFAQzE1U2s%3D (visited Mar. 2, 2012).

often names DISH Network and contrasts its video services to those offered by DISH Network.²⁹³ Similarly, DISH Network often compares its services with those offered by DIRECTV.²⁹⁴ Verizon FiOS and AT&T U-verse, on the other hand, tend to compare themselves to cable MVPDs, perhaps because they consider their bundle offerings as more similar to those offered by cable MVPDs and less similar to the bundles offered by DBS MVPDs.²⁹⁵

99. Consumers need information to make informed choices regarding MVPD services and MVPD providers. To provide this information, MVPDs use print, radio, television, and Internet media to motivate new and existing customers to call the MVPD, visit the MVPD's website, or contact independent third party retailers.²⁹⁶ Some MVPDs also use telemarketing and door-to-door sales.²⁹⁷ Customers looking to switch MVPD providers or purchase MVPD service for the first time receive and obtain information on services and promotional prices during introductory periods.²⁹⁸ Existing customers looking to change their services, but not necessarily their MVPD provider, receive and obtain information on upgrading HD and DVR receivers, free programming, and promotional prices for existing customers, possibly in exchange for a contractual commitment.²⁹⁹ Some MVPDs seek to retain subscribers that move to a new location by offering free installation of equipment at the new address.³⁰⁰

100. Because subscribers of MVPD services watch video programming daily and for many years, they value customer service. MVPDs recognize the importance of customer service as a critical component in customer acquisition and retention and explain their investment and efforts to improve customer service in communications with shareholders. For example, DIRECTV has 36 customer service centers that employ 17,000 customer service representatives.³⁰¹ Time Warner Cable explains that it continues to upgrade its customer care processes and infrastructure.³⁰² Time Warner Cable is upgrading its call center platforms and utilizing online approaches to give customers another alternative for engaging with the company.³⁰³ As another example, Charter explains that its strategy for customer retention is to enhance the customer experience by providing customer care, making it easier for customers to use Charter's service, and exceeding customer expectations.³⁰⁴ Periodic surveys of MVPD subscribers by

²⁹³ DIRECTV, http://www.directv.com/DIVAPP/content/directv_directv-vs-dish-network (visited Jan. 20, 2012).

²⁹⁴ DISH Network, http://www.dishnetwork.com/compare/index.aspx?WT.ac=ACQ_MKTG_DISH_STATIC_0112_getMoreForLess (visited Jan 25, 2012).

²⁹⁵ Verizon FiOS has mailed marketing materials containing messages such as: "Say good-bye to the cable company"; "FiOS vs. Cable or should we say the future vs. the past"; and "You're paying all that for cable and not getting all this?"

²⁹⁶ See, e.g., DISH Network 2010 Form 10-K at 4; Time Warner Cable 2010 Form 10-K at 6.

²⁹⁷ See, e.g., Time Warner Cable 2010 Form 10-K at 6.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See, e.g., DIRECTV 2010 Form 10-K at 39.

³⁰¹ DIRECTV 2010 Form 10-K at 7.

³⁰² Time Warner Cable 2010 Form 10-K at 6.

³⁰³ *Id.*

³⁰⁴ Charter Communications, *2010 Annual Report*, Letter to Shareholders at 4.

Consumer Reports and others provide information on which MVPDs are doing well meeting consumer expectations.³⁰⁵

101. Customer satisfaction can be influenced by more than products, prices, and customer service. For example, Comcast maintains that upgrading to an all-digital platform has enhanced its reputation for technical innovation.³⁰⁶ Comcast explains that this reputation, as well as the recent rebranding of products as Xfinity, has driven improved perceptions and customer satisfaction.³⁰⁷ Similarly, in 2010, Time Warner Cable refreshed its logo “to better convey the image of an innovative, dynamic company.”³⁰⁸ Time Warner Cable maintains that its name and logo “carry tremendous brand equity and high consumer recognition.”³⁰⁹

c. Business Models and Competitive Strategies of Select MVPDs

102. The MVPD group is comprised of 1,157 cable MVPDs, two DBS MVPDs, two large telephone MVPDs and many smaller telephone MVPDs.³¹⁰ Although each MVPD has its own business model and competitive strategy, there may be some similarities within types of MVPDs. Below, we provide an overview of the business models and competitive strategies focusing on the two largest cable MVPDs (Comcast and Time Warner Cable) and a few selected mid-sized and smaller cable MVPDs (Buckeye Cable System, BendBroadband, Adams Cable Service, Sweetwater Cable). We also provide an overview of the business models and competitive strategies of the two DBS MVPDs (DIRECTV and DISH Network). Finally, we provide an overview of the business models and competitive strategies of the two largest telephone MVPDs (AT&T and Verizon) and a new telephone MVPD (CenturyLink).

(i) Cable MVPD Business Models and Competitive Strategies

103. Pursuant to statutory requirements, cable operators offer a basic service tier that includes broadcast television signals, PEG channels, and a few other national, regional, or local video programming services.³¹¹ Cable MVPDs also offer one or more cable programming service tiers which include additional national, regional, and local cable entertainment, news and other networks, such as CNN, USA, and ESPN. In addition to providing an analog tier, cable operators also offer a digital tier or digital tiers, which enable digital video subscribers to receive additional cable networks. Some cable MVPDs are all digital and no longer offer an analog tier. Cable MVPDs also offer genre-based programming tiers, such as a movie tier or a sports tier, and premium services, such as HBO and Showtime.

104. *Large Incumbent Cable MVPDs.* In this category, we focus primarily on the business models and competitive strategies of the two largest cable MVPDs: Comcast and Time Warner Cable. Comcast is the largest cable MVPD and the largest MVPD, with 22.8 million video subscribers clustered in the mid-Atlantic, Chicago, Denver, and Northern California. Comcast has ownership interests in

³⁰⁵ See, e.g., DSL Reports, <http://www.dslreports.com/shownews/Consumer-Reports-FiOS-U-Verse-Tops-113561> (visited Mar. 2, 2012).

³⁰⁶ Comcast, *2010 Annual Review*, Letter to Shareholders at 2.

³⁰⁷ *Id.*

³⁰⁸ Time Warner Cable, *2010 Annual Report*, Letter to Shareholders at 2.

³⁰⁹ *Id.*

³¹⁰ See *supra*, ¶¶ 18, 28 & n. 33.

³¹¹ 47 U.S.C. § 543(b)(7).

approximately one out of every seven channels carried on its cable systems.³¹² Comcast has interests in numerous national networks including E!, Golf Channel, Versus, Style, G4, A&E, Bravo, Chiller, CNBC, MSNBC, Oxygen, Sleuth, SyFy, and The Weather Channel.³¹³ Comcast also has ownership interests in numerous regional sports networks ("RSNs").³¹⁴ In addition Comcast has ownership interests in the NBC network and its owned and operated ("O&O") NBC affiliated local television stations, the Telemundo network and its O&O Telemundo affiliated local television stations, and Universal Pictures.³¹⁵

105. Time Warner Cable is the second largest cable MVPD and the fourth largest MVPD, with over 12 million video subscribers clustered in five geographic areas – New York State (including New York City), the Carolinas, Ohio, Southern California (including Los Angeles), and Texas.³¹⁶ Time Warner Cable has ownership interests in national networks including MLB, MLS Direct Kick, NBA League Pass, NHL Center Ice, and Team HD, and numerous regional news networks and RSNs.³¹⁷

106. *Programming Tiers.* Comcast video services range from a limited basic package with 20 to 40 channels of linear programming to digital packages that may include over 300 linear channels and more than 100 HD channels.³¹⁸ Similarly, Time Warner Cable offers hundreds of video channels and HD channels throughout its footprint.³¹⁹

107. *Technology and Advanced Video Services.* Comcast and Time Warner Cable use a hybrid fiber optic and coaxial network that provides at least 750 MHz capacity and two-way transmission, which is essential to providing interactive services like VOD, Internet access, and telephone.³²⁰ Comcast offers more than 25,000 VOD titles with approximately 6,000 VOD HD titles each month and a 3D channel that aggregates 3D movies, sports, and other video programming.³²¹ In some markets, Comcast also offers "AnyRoom DVR," which allows subscribers to share recorded programs with any television in

³¹² Comcast 6/8/11 Comments at 7. In approving the Comcast's joint venture with General Electric, the Commission concluded that the transaction would give the joint venture the incentive and ability to block – temporarily or permanently – Comcast's video distribution rivals from accessing programming owned by the joint venture and to raise the programming costs of its video distribution rivals. *Comcast-NBCU Order*, 26 FCC Red at 4250, ¶ 29. Given the findings, the Commission adopted an arbitration remedy applicable to all Comcast-NBCU affiliated programming, including regional sports networks, to prevent these potential harms. *Id.* at 4364-70, App. A, § VII. With respect to program carriage, the Commission found that the vertical integration of Comcast's distribution network with NBCU's programming assets increased Comcast's ability and incentive to discriminate against or foreclose unaffiliated programming. *Id.* at 4282, ¶ 110. To remedy these harms, the Commission adopted a program carriage condition prohibiting Comcast from discriminating against programming vendors, including regional sports networks, on the basis of affiliation or nonaffiliation in the selection, price, terms or conditions of carriage. *Id.* at 4287, ¶ 121; *see also id.* at 4358, App. A, § III.1.

³¹³ For a list of Comcast's national programming interests, *see* Appendix B, Table B-1.

³¹⁴ For a list of Comcast's regional programming interests, *see* Appendix C, Table C-1.

³¹⁵ Comcast 2010 Form 10-K at 2.

³¹⁶ Time Warner Cable 2010 Form 10-K at 1.

³¹⁷ For a list of Time Warner Cable's programming interests, *see* Appendix B, Table B-1 and Appendix C, Table C-1.

³¹⁸ Comcast 2010 Form 10-K at 3; Comcast 6/8/11 Comments at 9.

³¹⁹ Time Warner Cable, <https://www.timewarnercableoffers.com/> (visited Mar. 3, 2012).

³²⁰ Time Warner Cable 2010 Form 10-K at 6.

³²¹ Comcast 6/8/11 Comments at 8-9, 11.

the house.³²² Similarly, in some markets, Time Warner Cable offers multi-room DVR service with 80 hours of storage for video programs and thousands of VOD titles to digital video subscribers.³²³ Time Warner Cable also offers Start Over, a feature that enables customers that have missed the beginning of a live program to watch it from the beginning.³²⁴

108. Large cable MVPDs have been transitioning to all-digital systems.³²⁵ Most large cable MVPDs currently provide some digital channels in all or nearly all systems and they are continuing to migrate analog channels to digital.³²⁶ Comcast and Cablevision appear to have made the most progress turning off analog channels. For example, 20 percent of Comcast's footprint is currently all-digital. And Cablevision is all-digital in its New York City and Connecticut markets.³²⁷ According to reports, Time Warner Cable, Cox, Charter, and Suddenlink are transitioning to digital more gradually.³²⁸

109. Comcast's TV Everywhere initiative offers digital subscribers 150,000 online video choices, including on-demand television shows, movies, and video clips, but little or no linear video programming.³²⁹ For subscribers with mobile devices, Comcast's TV Everywhere offers almost 6,000 hours of on-demand video content to subscribers with smart devices.³³⁰ As part of its TV Everywhere service, Time Warner Cable offers subscribers online sports programming from ESPN, ESPN2, ESPN3, to customers who subscribe to a video tier that includes those networks.³³¹

110. *Bundling.* Like most cable MVPDs, Comcast and Time Warner Cable sell video services separately and in bundled packages of video, Internet access, and telephone services. Each of these services is provided over their own two-way cable systems. Comcast and Time Warner Cable explain that their primary competition for bundles comes from AT&T and Verizon, which overlap some of their service areas and offer video, Internet access, and telephone services with features and functions comparable to those offered by Comcast and Time Warner Cable.³³²

111. *Marketing.* Comcast now markets its services under the Xfinity brand, which includes Xfinity TV, Xfinity Internet, and Xfinity Voice. In marketing its services, Comcast compares its offerings with those of DBS and telephone MVPDs.³³³ Time Warner Cable has begun targeting higher-end demographics with its SignatureHome service that offers an enhanced bundle of video, Internet

³²² *Id.* at 10.

³²³ Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/> (visited Mar. 2, 2012).

³²⁴ *Id.* See also Time Warner Cable 2010 Form 10-K at 3.

³²⁵ Katie Ardmore, *Cable Operators Progressing Slowly Toward All-Digital Systems*, COMM. DAILY, Feb. 22, 2012, at 8-10.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Comcast 6/8/11 Comments at 12-13.

³³⁰ *Id.* at 13.

³³¹ Time Warner Cable 2010 Form 10-K at 3.

³³² Comcast 2010 Form 10-K at 6; Time Warner Cable 2010 Form 10-K at 8, 9, 20, 38.

³³³ See Comcast, <http://www.comcast.com/Corporate/Learn/Compare/comcast-vs-att-verse.html?Processed=true> (visited Feb. 28, 2012).

access, and telephone services, and budget-conscious customers with its TV Essentials service that offers video only.³³⁴

112. *Small and Midsized Incumbent Cable MVPDs.* In this category, we consider four cable MVPDs: (i) Buckeye CableSystem (“Buckeye”), the 22nd largest cable MVPD, with approximately 135,000 subscribers in Northwest Ohio; Southeast Michigan; and Erie County, Ohio;³³⁵ (ii) BendBroadband, the 38th largest cable MVPD, with approximately 35,000 subscribers in 12 communities in Central Oregon;³³⁶ (iii) Adams Cable Service (“Adams”), the 42nd largest cable MVPD with approximately 22,000 subscribers in Carbondale, Pennsylvania;³³⁷ and (iv) Sweetwater Cable, the 52nd largest cable MVPD, with approximately 7,000 subscribers in Rock Springs and Green River, Wyoming.³³⁸

113. *Programming Tiers.* Buckeye offers 250 digital channels and HD channels.³³⁹ BendBroadband offers a range of digital video packages.³⁴⁰ At the low end is a limited video package with 27 channels and 12 HD channels. At the high end is a preferred video package with 92 channels and 59 HD channels, with the option of adding four genre-based programming tiers (*i.e.*, Variety, with 26 channels and eight HD channels; Sports with 17 channels and six HD channels; Movies, with 19 channels and two HD channels; and Discovery/MTV, with 13 channels). In addition, BendBroadband offers premium channels: HBO, Cinemax, Showtime, and Starz. Adams offers analog and digital video service ranging from a basic package with 17 channels to a digital package with an additional 120 channels and 48 HD channels.³⁴¹ Sweetwater Cable offers a basic video service and an expanded basic video service.³⁴² Prior to 2011, Sweetwater offered only analog video services.³⁴³ Currently, Sweetwater offers 22 channels on its basic service, 48 channels on its expanded basic service and 41 channels on its digital service.³⁴⁴

114. *Technology and Advanced Video Services.* Of the four systems studied, two offer comparable HD channels, DVR service, and VOD programming to the largest operators, one offers similar HD offerings but less robust DVR service and VOD programming, and the fourth offers DVR,

³³⁴ Time Warner Cable 2010 Form 10-K at 6.

³³⁵ Buckeye CableSystem, <http://www.buckeyecablesystem.com/index.html> (visited Oct. 31, 2011).

³³⁶ Communities in Central Oregon served by BendBroadband include: Bend, Black Butte, Culver, LaPine, Madras, Metolius, Prineville, Powell Butte, Redmond, Sisters, Sunriver, and Terrebonne. The company changed its name from Bend Cable to BendBroadband in 2003 in recognition that its services had expanded beyond cable television. See BendBroadband, http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci (visited Nov. 2, 2011).

³³⁷ Adams Cable Service, <http://www.adamscable.com/cable.html> (visited Nov. 2, 2011).

³³⁸ Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³³⁹ Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011).

³⁴⁰ BendBroadband, http://www.bendbroadband.com/residential/dc_index.asp?pageID=dc&adct=3 (visited Feb. 26, 2012).

³⁴¹ Adams Cable Service, <http://www.adamscable.com/cable.html> (visited Nov. 2, 2011).

³⁴² Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³⁴³ *Id.*

³⁴⁴ Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited Feb. 13, 2012).

VOD and limited HD service.³⁴⁵ Some of these systems are offering innovative services. For example, Buckeye recently introduced Whole Home VOD, which allows subscribers to access VOD programs on any television in the home.³⁴⁶ BendBroadband offers a service called Alpha, which combines a set-top receiver, cable modem, and wireless router into a single box that can record six video programs simultaneously.³⁴⁷ Adams offers pay-per-view movies and special events, but appears to offer a more limited selection of free VOD content than that found on the larger cable MVPDs.³⁴⁸ In addition, the company's DVR service is limited to a single room.

115. Overall, small and mid-sized cable MVPDs are also transitioning to all-digital systems. In a recent survey by the American Cable Association, 50 percent of the 107 cable MVPDs respondents indicate that they plan to either operate an all-digital system, or will be upgrading to all-digital within three years.³⁴⁹

116. *Bundling.* Each of the small cable systems we studied now offers Internet access and telephone services.³⁵⁰ Buckeye offers Internet access and telephone services and "money-saving" bundles similar to large cable MVPDs. BendBroadband offers Internet access (both wireline and wireless) and telephone service, separately and in bundles. Adams offers Internet access and telephone service, separately and in bundles, that appear to be comparable to those offered by larger cable MVPDs. In 2011, Sweetwater upgraded its cable systems to offer digital video service, as well as Internet access and telephone services.³⁵¹

117. *Marketing.* Buckeye's marketing is focused on winning subscribers from DBS MVPDs.³⁵² The company offers current DBS subscribers \$200 to convert to Buckeye's video service. As added incentives to subscribe to its bundle of services, Buckeye will remove the DBS satellite dish and provide a free month of Internet access and telephone service.

³⁴⁵ Buckeye offers 250 digital channels, HD channels, DVR service, and thousands of hours of VOD programming. Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011); BendBroadband offers a total of 108 HD channels, DVR service, and VOD. BendBroadband, http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1 (visited Nov. 2, 2011); Adams video services are comparable to those offered by the largest cable MVPDs, but it offers fewer VOD programs and its DVR service does not deliver programs to other televisions throughout the house. Adams Cable Service, <http://www.adamsable.com/index.html> (visited Nov. 2, 2011). According to Sweetwater Cable's website, it offers the Salt Lake City broadcast stations and a number of national cable networks in HD, with plans to add additional HD channels upon availability and system capacity. Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited July 10, 2012).

³⁴⁶ Buckeye CableSystem, <http://www.buckeyecablesystem.com/vod/index.html> (visited Oct. 31, 2011).

³⁴⁷ BendBroadband, http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1 (visited Nov. 2, 2011).

³⁴⁸ Adams Cable Service, <http://www.adamsable.com/cable.html> (visited Nov. 2, 2011).

³⁴⁹ See Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 11-169, PP Docket No. 00-67 (Feb. 27, 2012).

³⁵⁰ We note that not all of the smallest cable systems offer Internet access or telephone services. FCC staff analysis shows that 160 cable systems, each with less than 5,000 subscribers, filed a Form 325 for 2010. Of these, five cable systems offered neither Internet access nor telephone service.

³⁵¹ Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³⁵² Buckeye CableSystem, <http://www.buckeyecablesystem.com/nodish/index.html> (visited Oct. 31, 2011).

(ii) **DBS MVPD Business Models and Competitive Strategies**

118. DIRECTV is the second largest MVPD, with approximately 19 million subscribers in the United States.³⁵³ The company is organized into two operating segments: DIRECTV U.S. and DIRECTV Latin America.³⁵⁴ DIRECTV has ownership interests in Root Sports, a group of RSNs, and a 65 percent interest in Game Show Network, a cable television network dedicated to game-related programming and Internet interactive game playing.³⁵⁵ DISH Network is the third largest MVPD, with approximately 14 million subscribers.³⁵⁶ The company does not have significant ownership interests in programming networks. DISH Network recently acquired Blockbuster, Inc. and now offers DVDs and online streaming of video programming.³⁵⁷

119. *Programming Tiers.* At the end of 2010, DIRECTV offered over 285 all-digital channels, 160 national HD channels, and four 3D channels.³⁵⁸ At the end of 2010, DIRECTV offered local broadcast television stations (also called local-into-local service) in 172 television markets and local broadcast television HD channels in 155 television markets.³⁵⁹ DIRECTV also has exclusive rights to offer the NFL SUNDAY TICKET, which allows subscribers to view the largest selection of NFL games during the regular season.³⁶⁰ At the end of 2010, DISH Network offered 280 video channels and 215 national HD channels.³⁶¹ At the end of 2010, DISH Network offered local broadcast television stations in all 210 television markets and local broadcast television HD channels in more than 160 markets.³⁶² In 2010, DISH Network also offered 250 Latino and international channels, 30 premium movie channels, 35 regional and specialty sports channels, and 55 channels of pay-per-view content.³⁶³

120. *Technology and Advanced Video Services.* DIRECTV and DISH Network use an all-digital, one-way technology to deliver video programming to set-top receivers. Subscribers receive programming through a small satellite dish. DIRECTV uses 12 geosynchronous satellites (eleven owned and one leased).³⁶⁴ DISH Network uses 13 satellites (six owned, five leased from EchoStar, and two

³⁵³ DIRECTV 2010 Form 10-K at 2.

³⁵⁴ In this Report, we focus only on the DIRECTV U.S. segment.

³⁵⁵ DIRECTV 2010 Form 10-K at 2.

³⁵⁶ DISH Network 6/8/11 Comments at 2.

³⁵⁷ DISH Network, *Dish Network Agrees to Acquire Blockbuster Assets* (press release), Apr. 6, 2011; DISH Network, <http://www.dishnetwork.com/blockbuster/> (visited Jan. 25, 2012).

³⁵⁸ DIRECTV 6/8/2011 Comments at 10.

³⁵⁹ *Id.* DIRECTV has been expanding its local-into-local service and currently offers local broadcast television stations in 194 television markets and local broadcast television HD channels in 181 markets. DIRECTV, http://www.directv.com/DTVAPP/content/hd/hd_locals (visited Apr. 6, 2012).

³⁶⁰ DIRECTV, http://www.directv.com/DTVAPP/content/about_us/our_company (visited Feb. 26, 2012).

³⁶¹ DISH Network 2010 Form 10-K at 1-2.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ DIRECTV 2010 Form 10-K at 6.

leased from third parties).³⁶⁵ The satellites used by DIRECTV and DISH Network provide a nationwide footprint, such that almost every home has access to DBS MVPD service.³⁶⁶

121. DIRECTV offers a “whole home” DVR, which distributes video content to multiple televisions throughout the house from a single DVR.³⁶⁷ DISH Network says that its whole home DVR is coming soon.³⁶⁸ Because DBS technology is a one-way transmission service, DIRECTV and DISH Network provide their VOD service over the Internet. Thus, DBS subscribers must also subscribe to Internet access service to receive DBS VOD service. Both DIRECTV’s and DISH Network’s VOD service offer thousands of movies and television programs.³⁶⁹

122. In 2010, DIRECTV stated that its TV Everywhere strategy was to deliver the best anytime, anywhere video experience, in and out of the home.³⁷⁰ DIRECTV now offers shows, movies, sports, and NFL SUNDAY TICKET To-Go, which is available on the iPad.³⁷¹ DIRECTV also offers movies and television shows from HBO and Cinemax on cell phones, iPads, or online.³⁷² In 2010, DISH Network promoted a suite of products designed to make it convenient and easy to watch television anytime and anywhere.³⁷³ DISH Network’s TV Everywhere uses online access and Slingbox placeshifting technology.³⁷⁴ The service enables customers to watch live television on computers, iPads, iPhones, or Android devices; or access thousands of on-demand movies and shows from a computer at Dish Online or on an iPad using a DISH remote access application.³⁷⁵

123. DIRECTV notes that its advertising revenue per subscriber trails many of its competitors because it does not have the ability to target advertising at the local level due to its national satellite infrastructure.³⁷⁶ Using new technology, DIRECTV anticipates being able to insert advertisements into individual DVR set-top receivers. This will enable advertisers to target subscribers in local regions and

³⁶⁵ DISH Network 6/8/11 Comments at 5.

³⁶⁶ In addition to the contiguous 48 states, DIRECTV states that it provides the same programming packages for the same prices to customers in Alaska and Hawaii. DIRECTV 6/8/2011 Comments at 13-14. DISH Network also appears to offer the same programming packages to the contiguous 48 states and Alaska and Hawaii. See SatelliteSales.com, <http://www.satellitesales.com/ak-fairbanks-dish-network.html>; D&M Satellite Solutions, <http://www.dishthawaii.com/> (visited Mar. 14, 2012).

³⁶⁷ DIRECTV 6/8/2011 Comments at 4.

³⁶⁸ DISH Network, <http://www.dish.com/technology/receivers-dvrs/> (visited Feb. 29, 2012).

³⁶⁹ DIRECTV 6/8/2011 Comments at 2; DISH Network, <http://www.dish.com/entertainment/vod/> (visited Feb. 29, 2012).

³⁷⁰ DIRECTV, *2010 Annual Report*, Message to Shareholders.

³⁷¹ *Id.* See also DIRECTV, http://www.directv.com/DTVAPP/content/technology/mobile_apps?footernavtype=-1&lpos=header (visited Mar. 2, 2012).

³⁷² DIRECTV, http://www.directv.com/entertainment/watch_online/ (visited Mar. 5, 2010).

³⁷³ DISH Network, *2010 Annual Report*, Letter to Shareholders.

³⁷⁴ *Id.*

³⁷⁵ DISH Network, <http://www.dish.com/testdrive/> and <http://www.dish.com/technology/tv-everywhere/> (visited Mar. 2, 2010).

³⁷⁶ DIRECTV 2010 Form 10-K at 5-6.

eventually in the individual home. With this new technology, DIRECTV expects to increase its advertising revenues significantly.³⁷⁷

124. *Bundling.* DBS MVPDs rely on cooperative arrangements with telephone companies to offer a “synthetic bundle” of video, Internet access, and telephone service.³⁷⁸ DIRECTV explains that cable and telephone MVPDs have advantages over it because they have been able to upgrade their facilities to bundle their video service with two-way high-speed Internet access and telephone service over the same wire, which DIRECTV cannot do.³⁷⁹ DIRECTV also expresses concern that telephone companies that upgrade their networks with fiber optic technology to provide their own MVPD service have less incentive to bundle with DIRECTV.³⁸⁰ DISH also partners with telephone companies to bundle DISH Network video programming with Internet access and telephone service on a single bill.³⁸¹

125. *Marketing.* The marketing of DIRECTV and DISH Network is focused on delivered video programming, with less emphasis on bundles.³⁸² DISH Network markets its video programming packages as providing better “price-to-value” than those available from other MVPDs.³⁸³ DIRECTV compares its video services with those offered by DISH Network and also with those offered by cable and telephone MVPDs.³⁸⁴ DISH Network takes a similar approach, stating that it competes directly with DIRECTV in the market for the delivery of video programming, but also faces competition from cable and telephone MVPDs.³⁸⁵ Both DIRECTV and DISH Network assert that cable and telephone MVPDs have a competitive advantage in the provision of video, Internet access, and telephone service bundles.

(iii) Telephone MVPD Business Models and Competitive Strategies

126. In the last report, we explained that some telephone companies offered video service through cooperative arrangements with DBS MVPDs, although Verizon and AT&T were upgrading their networks to provide their own, facilities-based, wireline video service.³⁸⁶ At the time, some analysts were skeptical of Verizon and AT&T’s plans to build their own facilities-based video service and pointed to the

³⁷⁷ *Id.*

³⁷⁸ DIRECTV 6/8/11 Comments at 16; DISH Network 2010 Form 10-K at 3.

³⁷⁹ DIRECTV 2010 Form 10-K at 17.

³⁸⁰ *Id.* DIRECTV has cooperative arrangements with telephone companies that use DSL technology to offer Internet access and telephone services. When telephone companies (e.g., AT&T and Verizon) upgrade their systems and begin offering their own MVPD service, they may end their cooperative arrangements with DIRECTV. One analyst explains that DBS MVPDs remain “enormously dependent” on the telephone companies’ legacy DSL as their partner for broadband. Craig Moffett, *The Long View: Cord Cutting, Household Formation, and the Long Road to a New Pay TV Video Equilibrium*, BERNSTEIN RESEARCH, Nov. 10, 2011, at 15.

³⁸¹ DISH Network 2010 Form 10-K at 3.

³⁸² DIRECTV’s and DISH Network’s main websites market video programming, with no mention of Internet access or telephone services. DIRECTV, <http://www.directv.com/DIVAPP/index.jsp> (visited Feb. 29, 2012); DISH Network, <http://www.dishnetwork.com/> (visited Jan. 25, 2012). See also DIRECTV 6/8/11 Comments at 3.

³⁸³ DISH Network 2010 Form 10-K at 1.

³⁸⁴ DIRECTV, http://www.directv.com/DIVAPP/content/directv/competition?footernavtype=-1&lpos_header (visited Feb. 29, 2012).

³⁸⁵ DISH Network 2010 Form 10-K at 3.

³⁸⁶ *13th Report*, 24 FCC Red at 604-5, ¶ 131.

slower-than-projected rollout, the high capital costs, and the lack of differentiation from cable MVPD video and bundle offerings.³⁸⁷ Much has changed in the intervening years, and by the end of 2010, Verizon and AT&T were the seventh and ninth largest MVPDs. More recently, CenturyLink began upgrading its systems and offering its own MVPD service.

127. Verizon began offering video on its FiOS network in 2005. By the end of 2006, Verizon passed 2.4 million homes with 207,000 subscribers.³⁸⁸ By the end of 2010, Verizon passed 15.6 million homes with approximately 3.5 million video subscribers.³⁸⁹ Verizon recently stated that it plans to reach 18 million homes, but has no current plans to build out further.³⁹⁰ AT&T U-verse entered the market in late 2006 and by 2010 passed approximately 27 million homes and had approximately three million video subscribers.³⁹¹ In 2010, CenturyLink began offering Prism TV video service in Fort Myers, Florida, and Las Vegas, Nevada.³⁹² Subsequently, CenturyLink extended its Prism TV video service to Jefferson City, Missouri; Columbia, Missouri; La Crosse, Wisconsin; Tallahassee, Florida; Central Florida; and Raleigh, North Carolina.³⁹³ Prism TV service is now available to one million homes.³⁹⁴ Verizon, AT&T, and CenturyLink have no significant ownership interests in video programming networks.

128. *Programming Tiers.* Verizon's FiOS TV offers 530 all-digital video channels, 130 HD channels, and claims to offer more children's sports, and premium movie channels than cable MVPDs.³⁹⁵ AT&T's U-Verse TV offers a basic package with local channels only, a range of additional channel packages with anywhere from 130 to 470 video channels, and 170 HD channels.³⁹⁶ Prism TV offers over 230 channels and HD channels.³⁹⁷

129. *Technology and Advanced Video Services.* Verizon has deployed an all-digital fiber-to-the-premises network, which offers FiOS TV and FiOS Internet.³⁹⁸ FiOS offers 35,000 VOD titles each

³⁸⁷ Kagan Research, LLC., *Cable TV Investor: Deals & Finance*, Sept. 30, 2006, at 1, 6.

³⁸⁸ Verizon, *2006 Annual Report* at 19. The 207,000 subscribers in 2006 included both video and Internet subscribers. Verizon is organized into a Domestic Wireless and Wireline segment. FiOS is included in the Wireline segment. Verizon, *2010 Annual Report* at 14, 22.

³⁸⁹ Verizon 6/8/11 Comments at 5-6; Verizon, *2010 Annual Report* at 14-15.

³⁹⁰ In an interview with UBS analyst John Hodulik, Lowell McAdam, Verizon President & CEO, stated, "With FiOS we are about 16 million POPs at this point and we want to get to about 18 million. If we built out the whole footprint, we would be more in the 21 million, maybe a little bit more, range . . . But for now the bottom line is we are going to build out what we said and not any more." See *VZ-Verizon Communications Inc at UBS Media and Communications Conference*, Final Transcript, THOMSON STREETEVENTS, Dec. 7, 2011, http://www22.verizon.com/ide/groups/public/documents/adacct/event_1012_trans.pdf (visited Feb. 10, 2012).

³⁹¹ AT&T 6/8/11 Comments at 2-3. AT&T has four operating segments: Wireless, Wireline, Advertising Solutions, and Other. U-verse is included in the Wireline segment. AT&T, *2010 Annual Report*, at 33.

³⁹² CenturyLink, <http://www.centurylink.com/home/> (visited Jan. 26, 2012).

³⁹³ CenturyLink, <http://www.centurylink.com/prismtv/#prismChannelLineup.html> (visited Nov. 15, 2011).

³⁹⁴ CenturyLink, Inc., *CenturyLink Reports Strong Third Quarter 2011 Earnings* (press release), Nov. 2, 2011.

³⁹⁵ Verizon, <http://www22.verizon.com/home/fiosTV/> (visited Jan. 26, 2012).

³⁹⁶ AT&T, <http://www.att.com/u-verse/explore/tv-landing.jsp?wtSlotClick=1-0069UB-0-1&WT.svl=calltoaction> (visited Oct. 26, 2011).

³⁹⁷ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

³⁹⁸ Verizon, *2010 Annual Report*, at 46.

month and a multi-room DVR receiver.³⁹⁹ AT&T's U-verse uses an all-digital fiber-to-the-premises technology, which includes fiber-optic cable all the way to the home, or fiber-to-the-node technology, which includes fiber-optic cable to the node and copper wire from the node to the home.⁴⁰⁰ AT&T's IP technology sends only the video program selected by the subscriber to the set-top receiver.⁴⁰¹ AT&T U-verse offers a large library of VOD titles and a "Total Home" DVR receiver.⁴⁰² CenturyLink is in the process of deploying additional fiber and transitioning to an all-digital IP-based network.⁴⁰³ CenturyLink's Prism TV offers VOD and a whole home DVR that records four programs at once and holds 230 hours of video programming.⁴⁰⁴

130. For TV Everywhere, Verizon's states that its FlexView service is a "go-everywhere, watch-anywhere, mobile entertainment technology" that enables customers to view over 10,000 video titles.⁴⁰⁵ FiOS FlexView gives customers streaming video to televisions, computers, tablets, and smartphones.⁴⁰⁶ Verizon says customers can start watching a movie on one device and finish watching it on another device.⁴⁰⁷ With respect to TV Everywhere, AT&T stated in 2010 that it was increasingly focused on delivering video across networks and platforms so that customers could simply and seamlessly access video programming without giving a thought to whether they happened to be on a wired or a wireless network.⁴⁰⁸

131. *Bundling.* Although FiOS TV and U-verse TV can be purchased on a stand-alone basis, both Verizon and AT&T typically market video services in a bundle that includes video, Internet access, and telephone service.⁴⁰⁹ Verizon marketing focuses on bundles and states that its bundled pricing strategy allows it to provide competitive offerings to subscribers and potential subscribers.⁴¹⁰ AT&T states it uses a bundling strategy that "rewards customers who consolidate their services (e.g., local and long-distance telephone, high-speed Internet, wireless and video)."⁴¹¹ Verizon and AT&T contend that their most significant competitors are the incumbent cable operators that offer bundles of video, Internet

³⁹⁹ Verizon, <http://www.22.verizon.com/home/fiosTV/> (visited Jan. 26, 2012).

⁴⁰⁰ AT&T, http://www.att.com/Common/about_us/files/pdf/HowUverselsDelivered_2-22.pdf (visited Oct. 26, 2011). A node is a communications control unit in a video system that interconnects traditional coaxial cable and fiber-optics. It is the place where an optical signal is converted to a radio frequency (RF) signal, or vice versa.

⁴⁰¹ AT&T, http://www.att.com/Common/about_us/files/pdf/IPTV_background.pdf (visited Jan. 26, 2012).

⁴⁰² AT&T, http://www.att.com/Shop/tv_index.jsp?wtSlotClick=1-0056C5-0-4#fbid=dLBRF88Fm3S (visited Jan. 26, 2012).

⁴⁰³ CenturyLink, *2010 Review and CEO's Message*, at 4, <http://ir.centurylink.com/phoenix.zhtml?c=112635&p=irol-reportsannual> (visited Nov. 15, 2011).

⁴⁰⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

⁴⁰⁵ Verizon, <http://www.22.verizon.com/home/fiosTV/#connect> (visited Mar. 2, 2012).

⁴⁰⁶ Verizon, *2010 Annual Report*, at 6.

⁴⁰⁷ *Id.*

⁴⁰⁸ AT&T, *2010 Annual Report*, at 4.

⁴⁰⁹ Verizon, *2010 Annual Report*, at 25; AT&T, <http://www.att.com/Shop/u-verse/#fbid=dLBRF88Fm3S> (visited Jan. 26, 2012).

⁴¹⁰ Verizon, *2010 Annual Report*, at 25.

⁴¹¹ AT&T, *2010 Annual Report*, at 44.

access, and voice services in virtually every area that they provide service.⁴¹² Verizon and AT&T also state that their MVPD services experience significant video competition from DBS MVPDs.⁴¹³ CenturyLink states that 70 percent of Prism TV customers subscribe to a video, Internet access, and telephone services bundle.⁴¹⁴

132. Although bundling by cable MVPDs has generally involved triple-play offerings of video, Internet access, and telephone service, MVPDs have also added wireless telephone service through partnerships.⁴¹⁵ For example, Verizon Wireless and SpectrumCo, which is a joint venture among subsidiaries of Comcast, Time Warner Cable, and Bright House, have requested consent to assign 122 Advanced Wireless Services licenses to Verizon Wireless from SpectrumCo.⁴¹⁶ In a second application, Verizon Wireless and Cox have requested consent to assign 30 Advanced Wireless Services Licenses to Verizon Wireless from Cox.⁴¹⁷ The Commission consolidated consideration of the applications and issued a Public Notice.⁴¹⁸ In addition to acquiring spectrum from the cable companies, Verizon Wireless and the Applicants report that they have entered into agreements under which the cable companies and Verizon Wireless will sell one another's products and services.⁴¹⁹

133. *Marketing.* Verizon describes its all-fiber FiOS network as the fastest, highest-quality broadband network in the country.⁴²⁰ Verizon asserts that its networks differentiate it from its competitors.⁴²¹ Verizon markets FiOS TV as a premium service, although it also offers a less-promoted low-price, basic video service.⁴²² AT&T maintains that "U-verse uses fiber optic technology and computer networking to bring you better digital television, faster Internet, and a smarter phone."⁴²³

⁴¹² Verizon 6/8/11 Comments at 7; AT&T 6/8/11 Comments at 4; AT&T, *2010 Annual Report*, at 43-44.

⁴¹³ Verizon 6/8/11 Comments at 5; AT&T 6/8/11 Comments at 5.

⁴¹⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

⁴¹⁵ See *13th Report*, 24 FCC Red at 578, ¶ 69.

⁴¹⁶ See Application and Public Interest Statement of SpectrumCo., LLC, transferor, to Celco Partnership d/b/a Verizon Wireless, transferor (Dec. 16, 2011) ("Verizon Wireless-SpectrumCo- Application"). See also Verizon, Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for \$3.6 Billion (press release), Dec. 2, 2011.

⁴¹⁷ See Application and Public Interest Statement of Cox TMI Wireless, LLC, transferor, to Celco Partnership d/b/a Verizon Wireless, transferor (Dec. 21, 2011) ("Verizon Wireless-Cox Application"). See also Verizon, Cox Communications Announces Agreement to Sell Advanced Wireless Spectrum to Verizon Wireless (press release), Dec. 16, 2011.

⁴¹⁸ See *Celco Partnership D B A Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC Seek FCC Consent to the Assignment of AWS-1 Licenses*, WT Docket No. 12-4, Public Notice, 27 FCC Red 360 (WT 2012).

⁴¹⁹ Verizon Wireless-SpectrumCo Application, Public Interest Statement, at 1; Verizon Wireless-Cox Application, Public Interest Statement, at 1.

⁴²⁰ Verizon, *2010 Annual Report*, at 2-3.

⁴²¹ *Id.* at 8, 15. Verizon states that "Current and potential competitors for network services include other telephone companies, cable companies, wireless service providers, foreign telecommunications providers, satellite providers, electric utilities, Internet service providers, providers of VoIP services, and other companies that offer network services using a variety of technologies." *Id.* at 37.

⁴²² See Verizon, http://www22.verizon.com/home/aboutfios/?CMP=DMC-CVS_ZZ_ZZ_F_TV_N_X001 (visited Jan. 26, 2012).

⁴²³ AT&T, http://www.att.com/shop/u-verse/#fbid=QmA4InkA_TN (visited Mar. 5, 2012).

CenturyLink markets Prism TV as “TV worth switching for,” and “one of the most advanced TV services in the world,” which “will change the way you experience TV forever.”⁴²⁴

4. MVPD Performance

134. The structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality, and greater choice of services. To determine if the market for the delivery of video programming is producing these kinds of positive outcomes, we look at video prices and provide current prices for a sample of video packages offered by some MVPDs. We also examine competition in the market for the delivery of video programming from an investor perspective, including how the various types of MVPDs are doing relative to one another. As such, we report on video subscribers and penetration, revenue, investment, and profitability.

a. Video Programming Pricing

135. Section 623(k) of the Act of 1934, as amended by the Cable Act,⁴²⁵ requires the Commission to publish annually a statistical report on the average rates that cable operators charge for basic service, other cable programming, and cable equipment.⁴²⁶ Table 3 uses data from the Commission’s most recent report on cable industry prices to show prices for basic service, expanded basic service, and the next most popular service (plus equipment) for the years 2006 to 2010.⁴²⁷ Table 3 shows that prices for basic service, expanded basic service, and the next most popular service (plus equipment) increased over the period 2006 to 2010.⁴²⁸

⁴²⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Mar. 2, 2012).

⁴²⁵ See 47 U.S.C. § 543(k).

⁴²⁶ The 1992 Cable Act requires operators to offer an entry-level basic service, which must include, at a minimum, all commercial and noncommercial local broadcast stations entitled to carriage under the must-carry provisions of the Communications Act of 1934, 47 U.S.C. §§ 534-35. Basic service must also offer any other local broadcast station provided to any subscriber, as well as public, educational, and governmental access channels that the local franchise authority (LFA) may require the operator to carry. See 47 U.S.C. § 543(b)(7). Cable programming refers to a tier of video channels for which the operator charges a separate rate, other than the basic service channels and channels for which per-channel or per-program charges apply. See 47 U.S.C. § 543(k)(1)(2). Cable equipment refers to a converter box and other customer premises equipment for accessing cable services. See 47 U.S.C. § 543(b)(3).

⁴²⁷ See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 27 FCC Rcd 2427, 2435, Table 3 (MB 2012) (“2010 Cable Price Survey Report”).

⁴²⁸ The next most popular service package generally includes all the programming channels included in the expanded basic service package and at least seven additional cable network channels. *Id.* 2432, at ¶ 10.

Table 3: Historical Average Monthly Prices

Year	Basic Service Price	Expanded Basic Service Price	Next Most Popular Service & Equipment Price
2006	\$14.59	\$45.26	\$59.09
2007	\$15.33	\$47.27	\$60.27
2008	\$16.11	\$49.65	\$63.66
2009	\$17.65	\$52.37	\$67.92
2010	\$17.93	\$54.44	\$71.39

136. Table 4 provides examples of prominently displayed video packages from MVPD websites. Table 4 does not show all of the video packages offered by the MVPDs. For example, the cable MVPDs included in Table 4 offer basic and expanded basic video packages. These video packages, however, were not prominently displayed on their websites. Table 4 shows the name of the video package, the advertised price, and the number of channels.⁴²⁹ The advertised video packages are often promotional prices for new customers. At the end of the promotional time period, the price for services rises to the “normal” price. It is important to note that some of the video packages shown in Table 4 include advanced video services (*e.g.*, DVR service), some include equipment (*e.g.*, an HD/DVR set-top receiver), and some include premium channels (*e.g.*, HBO). Even where the number of channels is the same, each package contains a different mix of channels.⁴³⁰ Many services and features that affect the value of a video package are not shown in Table 4. Therefore, at best, this information provides only a starting point for comparing video packages since there is no standard video package for making direct price comparisons. For these reasons, Table 4 contains only a sample of advertised prices for prominently displayed video package offerings.

⁴²⁹ When MVPDs advertise the number of channels, they usually include both video channels and music channels. The video channels in Table 4 include those found on the basic and expanded basic service and a range of digital channels.

⁴³⁰ For example, some MVPDs include all of the premium movie channels in their most expensive advertised video package while other MVPDs include fewer premium movie channels in their most expensive advertised video package.

Table 4: Examples of MVPD Video Package Prices

Cable				
Comcast ⁴³¹	Digital Starter \$29.99 (80 channels)	Digital Preferred \$39.99 (160 channels)	Digital Premier \$84.99 (200 channels)	
Cox ⁴³²	TV Essential \$57.99 (95 channels)	Advanced TV Preferred \$67.99 (236 channels)	Advanced TV Premier \$76.99 (270 channels)	
BendBroadband ⁴³³	Essentials \$46.99 (159 channels)	Preferred \$54.99 (196 channels)	Gold Package \$98.47 (295 channels)	
DBS				
DIRECTV ⁴³⁴	Choice \$29.99 (150 channels)	Choice Extra \$34.99 (210 channels)	Choice Ultimate \$39.99 (225 channels)	Premier \$83.99 (285 channels)
DISH Network ⁴³⁵	America's Top 120 \$29.99 (120 channels)	America's Top 200 \$39.99 (200 channels)	America's Top 250 \$44.99 (250 channels)	America's "Everything" Pak \$79.99 (315 channels)
Telephone				
AT&T U-verse ⁴³⁶	U100 TV \$34 (210 channels)	U200 TV \$44 (270 channels)	U300 TV \$59 (360 channels)	U450 TV \$92 (430 channels)
Verizon FiOS ⁴³⁷	Prime HD \$64.99 (195 channels)	Extreme HD \$74.99 (285 channels)	Ultimate HD \$89.99 (350 channels)	

⁴³¹ Comcast, <http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (visited Nov. 9, 2011).

⁴³² Cox Communications, https://secure.cox.com/Service/Store/OrderNow.aspx?SO=W&camcode=sa-tv_1_special-offers (visited Nov. 9, 2011).

⁴³³ BendBroadband, http://www.bendbroadband.com/residential/de_index.asp?pageID_de#Essentials (visited Nov. 9, 2011).

⁴³⁴ DIRECTV, http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1 (visited Nov. 9, 2011).

⁴³⁵ DISH Network, <http://www.dishnetwork.com/packages/programming/default.aspx> (visited Nov. 9, 2011).

⁴³⁶ AT&T, <http://www.att.com/u-verse/shop/index.jsp?shopFilterId=100004&wtSlotClick=2-005THH-903422-2-&rel=nofollow#fbid=wqVQ02ViVNz> (visited Nov. 9, 2011).

⁴³⁷ Verizon, <http://www22.verizon.com/Residential/FiOSTV/Overview#plans> (visited Nov. 9, 2011).

b. Video Subscribers and Penetration

137. *Video Subscribers.* Table 5 shows the number of video subscribers for cable, DBS, and telephone MVPDs. Between 2006 and 2010, the number of subscribers to MVPD video service has grown from 95.8 million in 2006 to 100.8 in 2010, a net increase of five million subscribers.⁴³⁸ Over that period, however, cable MVPDs lost video subscribers and market share. At the end of 2006, cable MVPDs had 65.4 million video subscribers (68.3 percent of the 95.8 million MVPD video subscribers).⁴³⁹ By year-end 2010, the number of cable MVPD subscribers had declined to 59.8 million (59.3 percent of the MVPD subscribers), a loss of 5.6 million subscribers.⁴⁴⁰ Table 5 shows that from 2006 to 2010, large cable MVPDs accounted for the majority of the cable MVPD video subscriber losses. For example, Comcast lost 1.4 million video subscribers, Time Warner Cable lost one million video subscribers, Cox lost 500,000 video subscribers, and Charter lost 900,000 video subscribers.

138. SNL Kagan explains that competition continues to reduce cable's share of the U.S. video market and that cable MVPDs are expected to continue losing basic video subscribers to competing MVPDs.⁴⁴¹ According to SNL Kagan, cable video subscriptions have been eroded by competition from new telephone MVPDs and established DBS MVPDs.⁴⁴² Another analyst says that a weak economy is a contributing factor but increased competition from DBS and telephone MVPDs is the main reason that cable MVPDs are losing video subscribers.⁴⁴³

139. Table 5 shows that DBS MVPDs and telephone MVPDs gained video subscribers and market share during the period 2006 to 2010. In 2006, DBS MVPDs had 29.1 million video subscribers (30.4 percent).⁴⁴⁴ By 2010, the number of DBS MVPD video subscribers had increased to 33.4 million (33.1 percent), a gain of 4.3 million subscribers.⁴⁴⁵ DIRECTV credits its increase in subscribers and market share to taking customers primarily from cable.⁴⁴⁶ Similarly, in 2006, telephone MVPDs had approximately 300,000 video subscribers (0.3 percent).⁴⁴⁷ Five years later, the number of telephone MVPD video subscribers had increased to 6.9 million (6.8 percent of MVPD video subscribers), a gain of 6.6 million subscribers. According to SNL Kagan, the subscriber gains of telephone MVPDs come at the

⁴³⁸ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ SNL Kagan, *Broadband Cable Financial Databook*, 2010 Edition, at 6.

⁴⁴² SNL Kagan, *Cable TV Investor: Deals & Finance*, Jan. 29, 2010, at 10.

⁴⁴³ Marguerite Reardon, *Competition and a Weak Economy Plague Cable TV*, CNET NEWS, Nov. 3, 2011, http://news.cnet.com/8301-30686_3-57316511-266/competition-and-a-weak-economy-plague-cable-tv/ (visited Apr. 6, 2012). The article cites statements from Craig Moffett, an analyst with Sanford Bernstein.

⁴⁴⁴ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴⁴⁵ *Id.*

⁴⁴⁶ DIRECTV, *2010 Annual Report*, Message to Shareholders.

⁴⁴⁷ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

expense of cable and DBS MVPDs, rather than from a larger percentage of homes subscribing to MVPD video services.⁴⁴⁸

Table 5: MVPD Video Subscribers (in millions)

Year	2006	2007	2008	2009	2010
MVPD Total ⁴⁴⁹	95.8	97.7	98.9	100.7	100.8
Cable ⁴⁵⁰	65.4	64.9	63.7	62.1	59.8
Comcast	24.2	24.1	24.2	23.6	22.8
Time Warner	13.4	13.3	13.1	12.9	12.4
Cox	5.4	5.4	5.3	5.2	4.9
Charter	5.4	5.2	5.0	4.8	4.5
Cablevision	3.1	3.1	3.1	3.1	3.3
Bright House	2.3	2.3	2.3	2.3	2.2
Suddenlink	1.4	1.3	1.3	1.2	1.2
Mediacom	1.4	1.3	1.3	1.2	1.2
All Other Cable ⁴⁵¹	8.8	8.9	8.1	7.8	7.3
DBS ⁴⁵²	29.1	30.6	31.3	32.6	33.3
DIRECTV ⁴⁵³	16.0	16.8	17.6	18.5	19.2
DISH Network ⁴⁵⁴	13.1	13.8	13.7	14.1	14.1

⁴⁴⁸ SNL Kagan, *Broadband Technology*, June 19, 2009, at 1.

⁴⁴⁹ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011). Table 5 does not include subscribers to PCO, HSD, OVS, and wireless cable MVPDs, which had fewer than one million subscribers between 2006 and 2010. In addition, the number of video subscribers for individual companies in Table 5 is rounded to the nearest 100,000. Because some types of MVPDs are not included and because of rounding, the sum of the individual entries does not equal the MVPD totals.

⁴⁵⁰ *Id.* Individual cable company data come from SNL Kagan, *Top Cable MSOs*, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited Dec. 21, 2011).

⁴⁵¹ All other cable subscribers are estimated by subtracting the subscribers of the eight largest cable MVPDs from total cable subscribers.

⁴⁵² SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴⁵³ DIRECTV subscriber numbers come from DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2006*, at 3 ("DIRECTV 2006 Form 10-K"); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2007*, at 3 ("DIRECTV 2007 Form 10-K"); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2008*, at 3 ("DIRECTV 2008 Form 10-K"); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2009*, at 3 ("DIRECTV 2009 Form 10-K"); DIRECTV 2010 Form 10-K at 2.

⁴⁵⁴ DISH Network subscriber numbers come from EchoStar, *SEC Form 10-K/A for the Year Ended December 31 2006*, at 1; DISH Network, *SEC Form 10-K for the Year Ended December 31, 2007*, at 1; DISH Network, *SEC Form 10-K for the Year Ended December 31, 2008*, at 1 ("DISH Network 2008 Form 10-K"); DISH Network, *SEC Form 10-K for the Year Ended December 31, 2009*, at 1; DISH Network 2010 Form 10-K at 1.

Table 5: MVPD Video Subscribers (in millions) (continued)

Year	2006	2007	2008	2009	2010
Telephone ⁴⁵⁵	0.3	1.3	3.1	5.1	6.9
AT&T U-verse	0	0.2	1.0	2.1	3.0
Verizon FiOS	0.2	0.9	1.9	2.9	3.5
All Other Telephone ⁴⁵⁶	0.1	0.1	0.2	0.1	0.4

140. Consumers watch delivered video programming that appeals to them even when the programming is not provided by MVPDs.⁴⁵⁷ From 2006 to 2010, an increasing number of consumers streamed an increasing amount of video content directly from the Internet to computers, television sets, tablets, and smartphones.⁴⁵⁸ Although some consumers may consider online video to be a substitute for MVPD video, other consumers may consider online video to be a complement to MVPD video. According to Nielsen, during the second quarter of 2011, Americans watched each week on average 32 hours and 47 minutes of traditional television, two hours and 21 minutes of time-shifted television, 27 minutes of Internet video, and seven minutes of smart phone video.⁴⁵⁹ Reports suggest that some consumers are dropping their MVPD video services (“cutting-the-cord”) or eliminating subscriptions for some video services such as premium channels (“cord-shaving”) in favor of video services delivered over the Internet.⁴⁶⁰ According to one estimate, 13 percent of consumers with a broadband connection “cord-shaved” in the past year.⁴⁶¹ However, there are also indications that increased viewing of video

⁴⁵⁵ SNL Kagan, *U.S. Multichannel Industry Benchmarks*.

<http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011). Individual telephone company data come from SNL Kagan, *Broadband Cable Financial Databook*, 2008 Edition, at 48; 2009 Edition, at 50; 2010 Edition, at 44; 2011 Edition, at 42.

⁴⁵⁶ All other telephone MVPD subscribers are estimated by subtracting the subscribers of the two largest telephone MVPDs from total telephone MVPD subscribers.

⁴⁵⁷ NCTA 6/8/11 Comments at 19-21.

⁴⁵⁸ We discuss online video distributors in Section III. C. of this Report.

⁴⁵⁹ Nielsen, *The Cross-Platform Report*, Quarter 2, 2011, at 5.

⁴⁶⁰ See Ian Olgeirson & Deana Myers, *Over-the-top Substitution Forecast to Erode Multichannel Penetrations*, SNL Kagan, July 15, 2011, <http://www.snl.com/interactivex/article.aspx?id=13029656&KPI.T=6> (estimating that nearly 4 percent of occupied U.S. households will employ Internet video in lieu of subscribing to a multichannel video package at year-end 2011); Terrence O'Brien, *Netflix Users More Likely to Cut the Cord*, SWITCHED, Jan. 5, 2011, <http://www.switched.com/2011/01/05/netflix-users-more-likely-to-cut-the-cable-cord/> (citing a JP Morgan survey that 28 percent of cable subscribers would consider cutting the cord, but that 47 percent of Netflix customers would do so); Andy Plesser, *Roku Owners are “Cutting the Cord” in Substantial Numbers*, Beet.TV, May 10, 2011, <http://www.beet.tv/2011/05/roku-owners-are-cutting-the-cord-in-substantial-numbers.html> (citing interview with Jim Funk of Roku that “[s]ome 15-20 percent of Roku owners are cancelling their cable or satellite services agreement and are relying solely on a broadband connection to get their television programming”).

⁴⁶¹ *High-speed Broadband May Accelerate Cord Cutting*, Parks Associates, Aug. 24, 2011, <http://www.parksassociates.com/blog/article/high-speed-broadband-may-accelerate-cord-cutting>. One commenter explains that viewing Internet content on a television set can be relatively simple, as “simple as connecting a cable between the HDMI output of a computer and the HDMI input of a television set” though not many consumers may be inclined to view television programming in this manner. Nonetheless, such direct PC-to-TV connections are deemed infrequent and restricted to tech-savvy consumers, with approximately one-third of broadband users connecting a PC to their TV specifically to enjoy PC or online video on “the big screen” at least once a year. See NCTA 6/8/2011 Comments at 24 (citing The Diffusion Group, *PC-to-TV Connectivity More Widespread Than* (continued....))

programming delivered over the Internet does not necessarily translate into decreased MVPD subscriptions.⁴⁶²

141. *Video Penetration.* Because a large part of all MVPD video delivery systems represents fixed costs (costs that do not vary with the number of subscribers), higher levels of video penetration (the number of video subscribers divided by the number of homes passed by the MVPD) typically translate into lower costs per subscriber and increased profit.⁴⁶³ Comparing the video penetration of one type of MVPD with the video penetration of another type of MVPD can be problematic, however, because the different types of MVPDs have different fixed costs.⁴⁶⁴ For instance, the fixed costs of offering cable MVPD service to every home in the United States is much higher than the fixed costs of offering DBS MVPD service to every home in the United States.⁴⁶⁵ As such, a DBS MVPD may be on solid financial footing with lower video penetration, relative to a cable MVPD with higher video penetration. Regardless of technology, however, every MVPD seeks higher levels of video penetration.

142. Table 6 shows MVPD video penetration for the years 2006 through 2010. Over the five-year period, cable MVPD video penetration decreased from 53.8 percent of all homes passed by cable MVPDs to 46.5 percent. This is consistent with our finding that cable MVPDs lost subscribers over the same period. In contrast, DBS MVPD video penetration increased from 22.9 percent of all homes in 2006 to 25.5 percent in 2010. Over the same period, telephone MVPDs built new video delivery systems and signed subscribers, increasing their video penetration from 3.3 percent to 15.2 percent of all homes. To the extent that telephone MVPDs incur fixed and operating costs similar to those incurred by cable MVPDs, telephone MVPDs will have to increase video penetration to realize financial returns similar to those earned by cable MVPDs.⁴⁶⁶

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Perceived, Mar. 1, 2011, <http://tdgresearch.com/blogs/press-releases/archive/2011/03/01/pc-to-tv-connectivity-more-widespread-than-perceived.aspx>).

⁴⁶² Frank N. Magid Associates, Inc., *Magid Study: Consumers More Connected to TV Sets Than Ever – TV Purchase Intentions Climb to Pre-Recession Levels, Demand for Smart TV's Impressive* (press release), Nov. 22, 2011.

⁴⁶³ Harold L. Vogel, *ENTERTAINMENT INDUSTRY ECONOMICS* 339-43 (Cambridge University Press) (8th ed. 2011) (“Vogel”).

⁴⁶⁴ *Id.* at 344-46.

⁴⁶⁵ DIRECTV explains that its satellite-based service provides many advantages over ground-based cable television services including the ability to distribute video programming to millions of recipients nationwide with minimal incremental infrastructure cost per additional subscriber. Satellites also provide comprehensive coverage to areas with low population density. DIRECTV 2010 Form 10-K at 4.

⁴⁶⁶ *Hazlett on Verizon FiOS Project*, George Mason University School of Law, http://www.law.gmu.edu/news/2010-hazlett_fios (visited Jan. 16, 2012).

Table 6: MVPD Video Penetration

Year	2006	2007	2008	2009	2010
Cable ⁴⁶⁷	53.8%	52.4%	50.7%	48.9%	46.5%
Comcast	51.0%	49.8%	47.8%	45.5%	43.9%
Time Warner	51.4%	50.0%	48.8%	47.0%	45.2%
Cox	58.3%	57.1%	54.8%	52.5%	49.5%
Charter	46.3%	44.8%	43.1%	40.4%	38.4%
Cablevision	68.5%	66.7%	65.7%	63.4%	59.9%
Bright House	57.8%	57.4%	56.1%	54.1%	51.6%
Suddenlink	49.7%	49.5%	48.8%	46.4%	45.4%
Mediacom	48.8%	46.7%	46.3%	44.1%	42.4%
DBS ⁴⁶⁸	22.9%	23.8%	24.2%	25.0%	25.5%
DIRECTV	12.6%	13.1%	13.6%	14.2%	14.7%
DISH Network	10.3%	10.7%	10.6%	10.8%	10.8%
Telephone ⁴⁶⁹	3.3%	6.4%	9.8%	13.2%	15.2%
AT&T U-verse	N/A	2.5%	5.9%	9.3%	11.0%
Verizon FiOS	3.3%	9.7%	15.0%	18.8%	22.4%

143. *Digital Video, Internet, and Telephone Subscription and Penetration.* SNL Kagan reports that cable MVPDs have been losing video subscribers at an increasing rate over the last five years. At the same time, however, the remaining cable customers added subscriptions to digital video service or

⁴⁶⁷ Estimates are derived by dividing all cable basic subscribers by all cable homes passed. Because cable MVPDs rarely offer video service in the same geographic areas, video penetration for all cable MVPDs is a weighted average of the video penetration of all cable MVPDs. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 23, 2011). Individual cable company data come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 5.

⁴⁶⁸ Estimates are derived by dividing all DBS MVPD subscribers by the number of homes in the United States. Because DIRECTV and DISH Network offer MVPD service to all homes in the United States, DBS video penetration can also be derived by summing the video penetration of DIRECTV and DISH Network. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 23, 2011). Individual DBS company estimates are derived by dividing the company's subscribers (as reported in their annual reports) by the number of homes in the United States.

⁴⁶⁹ Estimates are derived by summing Verizon and AT&T MVPD subscribers and dividing by the number of Verizon FiOS and AT&T U-verse homes passed. Because Verizon and AT&T do not offer MVPD service in the same geographic area, video penetration is a weighted average of the video penetration of these two telephone MVPDs. Verizon and AT&T estimates are derived by dividing a company's MVPD subscribers (as reported in their annual reports) by the number of homes passed by the company's MVPD system (as reported in their annual reports).

subscribed to cable bundles that include video, Internet access, and telephone services.⁴⁷⁰ While cable MVPD video subscribers decreased from 65.4 million in 2006 to 59.8 million in 2010, the number of cable customers that subscribed to digital video service grew from 32.6 million to 44.7 million, and digital video penetration rose from 49.8 percent to 74.8 (*i.e.*, the number of digital video subscribers divided by the number of basic cable subscribers).⁴⁷¹ In addition, the number of cable Internet access subscribers grew from 31.1 million in 2006 to 44.4 million in 2010, increasing Internet penetration (*i.e.*, the number of Internet subscribers divided by the number of cable homes passed) from 25.0 percent to 34.8 percent.⁴⁷² In addition, the number of telephone subscribers grew from 9.4 million in 2006 to 23.9 million in 2010, with telephone penetration (*i.e.*, the number of telephone subscribers divided by the number of homes passed) increasing from 11.1 percent to 19.2 percent.⁴⁷³

c. Revenue

144. The varied business models of the different types of MVPDs complicate any discussion of revenue. Specifically, cable and telephone MVPDs, which have two-way systems, offer video, Internet, and telephone services and earn revenue from each of these services. Thus, data regarding total revenue for cable and telephone MVPDs reflect an aggregation of revenue from multiple services. In contrast, DBS MVPDs, have one-way systems and earn almost all of their revenue from delivered video services. Although we report MVPD total revenue, because the focus of this Report is the delivery of video programming when data are available we also report the revenue earned from video services. Providing both total revenue and video revenue facilitates a comparison regarding how much of a specific MVPD's business is related to the delivery of video services.

145. Table 7 shows MVPD total revenue. Total revenue for cable MVPDs derives from video, Internet access, and telephone services sold to both residential units and businesses. Total revenue for cable MVPDs increased from \$71.9 billion in 2006 to \$93.8 billion in 2010. Revenue from video accounted for 63 percent of cable MVPD total operating revenue in 2010, Internet access accounted for 21 percent, telephone accounted for approximately 10 percent, and commercial services accounted for approximately 6 percent.⁴⁷⁴ Table 7 also provides total revenue for a sample of cable MVPDs.⁴⁷⁵ Each of the large cable MVPDs in our sample increased total revenue over the period 2006 to 2010. Total revenue for DBS MVPDs increased from \$24.6 billion in 2006 to \$36.7 billion in 2010, and almost all of the revenue comes from the video services.⁴⁷⁶ Table 7 shows total revenue for AT&T and Verizon. Total

⁴⁷⁰ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 2.

⁴⁷¹ *Id.* at 7.

⁴⁷² *Id.* at 8.

⁴⁷³ *Id.* at 10.

⁴⁷⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. We include local advertising revenue and "miscellaneous" revenue in our estimates of video revenue. Miscellaneous revenue includes installation fees, home shopping, equipment charges, home networking, pay-per-view and VOD, DVRs, and HD.

⁴⁷⁵ Total revenue estimates for individual cable MVPDs comes from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁴⁷⁶ For DISH Network, subscriber-related revenue accounted for over 99 percent of total operating revenue in 2010. DISH explains that subscriber-related revenue consists of revenue from basic, premium movie, local, HD and pay-per-view programming, as well as Latino and international subscription television services, equipment rental fees and other hardware related fees, including fees for DVRs, equipment upgrade fees and additional outlet fees from subscribers with multiple receivers, advertising services, fees earned from in-home service operations, and other subscriber revenue. DISH Network 2010 Form 10-K at 45, 48. DIRECTV explains that it earns revenues mostly from the monthly fees it charges subscribers for subscriptions to basic and premium channel programming. HD (continued....)

revenue for AT&T combines revenue from its wireless segment, which accounted for 47 percent of its total operating revenue in 2010; its wireline segment (that includes U-verse), which accounted for 49 percent of its total operating revenue in 2010; and two other segments, which together accounted for four percent of its total operating revenue.⁴⁷⁷ Total revenue for Verizon combines revenue from its domestic wireless segment and its wireline segment (that includes FiOS). The wireless segment contributed approximately 60 percent of Verizon's total operating revenue in 2010 and the wireline segment contributed approximately 40 percent.⁴⁷⁸

Table 7: MVPD Total Revenue (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁴⁷⁹	\$71.9	\$78.9	\$85.2	\$89.5	\$93.8
Comcast	\$26.5	\$30.3	\$32.6	\$33.9	\$35.4
Time Warner	\$14.8	\$16.0	\$17.2	\$17.9	\$18.9
Charter	\$5.5	\$6.0	\$6.4	\$6.7	\$7.0
Cablevision	\$4.1	\$4.5	\$5.0	\$5.2	\$5.5
Suddenlink	\$0.9	\$1.3	\$1.5	\$1.6	\$1.7
Mediacom	\$1.2	\$1.3	\$1.4	\$1.5	\$1.5
DBS ⁴⁸⁰	\$24.6	\$28.3	\$31.3	\$33.3	\$36.7
DIRECTV ⁴⁸¹	\$14.8	\$17.2	\$19.7	\$21.6	\$24.1
DISH Network ⁴⁸²	\$9.8	\$11.1	\$11.6	\$11.7	\$12.6
Telephone ⁴⁸³	\$150.7	\$211.8	\$220.8	\$230.3	\$230.9
AT&T ⁴⁸⁴	\$62.5	\$118.3	\$123.4	\$122.5	\$124.3
Verizon ⁴⁸⁵	\$88.2	\$93.5	\$97.4	\$107.8	\$106.6

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programming and access fees, pay-per-view programming, and seasonal and live sporting events. DIRECTV also earns revenues from monthly fees that it charges subscribers for leased set-top receivers and DVR service. DIRECTV 2010 Form 10-K at 38.

⁴⁷⁷ AT&T, *2010 Annual Report*, at 33.

⁴⁷⁸ Verizon, *2010 Annual Report*, at 13.

⁴⁷⁹ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. The estimates shown are based on all cable MVPDs, not just the cable MVPDs listed in Table 7.

⁴⁸⁰ Total revenue for DBS is the sum of total revenue for DIRECTV and DISH Network.

⁴⁸¹ DIRECTV 2010 Form 10-K at 30.

⁴⁸² DISH Network 2010 Form 10-K at 41.

⁴⁸³ The estimates shown are the sum of total revenue for AT&T and Verizon and do not include other telephone companies that offer MVPD service. As such, the estimates understate total revenue for telephone MVPDs.

⁴⁸⁴ AT&T, *2010 Annual Report*, at 30.

⁴⁸⁵ Verizon, *2010 Annual Report*, at 13.

146. Table 8 shows available data on MVPD revenue from video services alone. Cable MVPD video revenue increased from \$51.8 billion in 2006 to \$59.0 billion in 2010.⁴⁸⁶ Although the number of basic cable MVPD subscribers decreased from 2006 to 2010, the remaining subscribers purchased an increasing number of subscriptions to advanced video services (e.g., digital programming tiers and HD and DVR services). The increased number of subscriptions to advanced video services and increases in the prices charged for cable MVPD services resulted in an increase in cable MVPD revenue during the period 2006 to 2010.⁴⁸⁷ DBS MVPD video revenue increased from \$23.5 billion to \$32.9 billion. Table 8 also shows video revenue for a select number of publicly-traded cable MVPDs. AT&T and Verizon do not report video revenue separately.⁴⁸⁸

⁴⁸⁶ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. Estimates for cable MVPD video revenue were derived by summing basic cable revenue, total pay revenue, total digital tier revenue, net local advertising revenue, and miscellaneous revenue (which include revenues from installation and equipment rentals, VOD, DVR, and HD).

⁴⁸⁷ *Id.* at 2, 12.

⁴⁸⁸ Within AT&T's wireline segment, the company aggregates video revenue into "Data" revenue, which includes video service, Internet access service from both U-verse and DSL, and VoIP telephone service from U-verse. AT&T asserts that it expects revenue from U-verse to expand as revenue from traditional, circuit-based services continues to decline. AT&T, *2010 Annual Report*, at 37-38.

Within Verizon's wireline segment, video revenue is aggregated into "Mass Markets" revenue, which includes video service, Internet access service from both FiOS and DSL, and traditional landline and VoIP telephone service. Verizon explains that increases in Mass Markets revenue from 2009 to 2010 are driven by the expansion of consumer and business FiOS services, which is partially offset by a decline of local exchange revenue stemming from a decline in legacy landline telephone service. Verizon, *2010 Annual Report*, at 25.

Table 8: Video Revenue (in billions)

Year	2006	2007	2008	2009	2010
Cable	\$51.8	\$54.3	\$56.6	\$57.4	\$59.0
Comcast ⁴⁸⁹	\$15.1	\$17.7	\$19.2	\$19.4	\$19.5
Time Warner ⁴⁹⁰	\$7.6	\$10.2	\$10.5	\$10.8	\$11.0
Charter ⁴⁹¹	\$3.3	\$3.4	\$3.7	\$3.7	\$3.7
Cablevision ⁴⁹²	\$2.6	\$2.8	\$3.0	\$3.1	\$3.2
DBS⁴⁹³	\$23.5	\$26.6	\$28.9	\$30.4	\$32.9
DIRECTV ⁴⁹⁴	\$13.7	\$15.5	\$17.3	\$18.7	\$20.3
DISH Network ⁴⁹⁵	\$9.8	\$11.1	\$11.6	\$11.7	\$12.6

147. *Average Revenue Per Unit.* Average revenue per unit (“ARPU”) is a performance metric that estimates the value of a single unit by dividing a company’s total revenue by the total number of units. In this case a unit is a single subscriber. The metric includes revenue from all services. Therefore, for those MVPDs that provide video, Internet access, and telephone service, this metric includes revenue from all of these services and associated equipment such as set-top boxes and modems. Since this Report, however, is focused on video, when data are available, we also report ARPU for video services alone, which is estimated by dividing video revenue by the total number of video subscribers.

148. Table 9 shows monthly ARPU for all services for the five-year period from 2006 to 2010. Cable MVPDs’ per-subscriber monthly revenue has risen steadily over this period due to a combination of growth in the number of subscribers to cable bundles, growth in the number of subscribers to advanced services, and price rate increases.⁴⁹⁶ Monthly ARPU for cable MVPDs was \$87.70 in 2006, and increased to \$122.20 in 2010. DBS MVPDs generally receive smaller ARPU compared to cable MVPDs.⁴⁹⁷

⁴⁸⁹ Comcast 2010 Form 10-K at 39; Comcast, *SEC Form 10-K for the Year Ended December 31, 2007*, at 24.

⁴⁹⁰ Time Warner Cable, *2010 Annual Report*, at 69; Time Warner Cable, *SEC Form 10-K for the Year Ended December 31, 2007*, at 89.

⁴⁹¹ Charter, *SEC Form 10-K for the Year Ended December 31, 2010*, at 43; Charter, *SEC Form 10-K for the Year Ended December 31, 2007*, at 24.

⁴⁹² Cablevision, *SEC Form 10-K for the Year Ended December 31, 2010*, at 68; Cablevision, *SEC Form 10-K for the Year Ended December 31, 2008*, at 67; Cablevision, *SEC Form 10-K for the Year Ended December 31, 2007*, at 63.

⁴⁹³ DBS MVPD video revenue is the sum of DIRECTV U.S. and DISH Network video revenue.

⁴⁹⁴ DIRECTV video revenue is less than total revenue because we report video revenue from DIRECTV U.S. and exclude video revenue from DIRECTV Latin America. DIRECTV 2010 Form 10-K at 35; DIRECTV 2007 Form 10-K at 40.

⁴⁹⁵ DISH Network 2010 Form 10-K at 41.

⁴⁹⁶ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁴⁹⁷ Whereas cable MVPDs receive revenue from video, Internet access, and telephone services, DBS relies almost exclusively on revenue from video services.

Although AT&T and Verizon estimate ARPU for their Wireless segments, they do not make similar estimates for their Wireline segments, which include their video services, so data are not available to calculate this performance metric.⁴⁹⁸

Table 9: Monthly ARPU for All MVPD Services

Year	2006	2007	2008	2009	2010
Cable⁴⁹⁹	\$87.70	\$95.30	\$105.40	\$113.70	\$122.20
Comcast	\$91.30	\$101.60	\$111.10	\$118.20	\$127.10
Time Warner Cable	\$91.70	\$94.10	\$102.50	\$110.30	\$118.60
Charter	\$84.60	\$94.10	\$105.10	\$114.70	\$125.70
Cablevision	\$110.40	\$121.20	\$132.70	\$140.40	\$143.00
Suddenlink	\$78.00	\$81.80	\$93.20	\$103.20	\$114.40
Mediacom	\$72.00	\$79.70	\$88.40	\$95.20	\$102.80
DBS					
DIRECTV ⁵⁰⁰	\$73.70	\$79.10	\$83.90	\$85.50	\$89.70
DISH Network ⁵⁰¹	\$62.80	\$65.80	\$69.30	\$70.00	\$73.30

149. Table 10 shows monthly ARPU for video services alone. Despite losses in cable subscribers, cable MVPDs achieved increased ARPU for video services from 2006 to 2010 by raising prices and increasing subscriptions from the remaining customers for advanced video services (e.g., digital video, DVR, VOD, and HD).⁵⁰² Video ARPU for cable MVPDs increased from \$52.20 in 2006 to \$66.40 in 2010. Table 10 also includes video ARPU estimates for a sample of cable companies. The results show consistent growth in video ARPU for each of these cable companies. Because DBS MVPDs earn almost all of their operating revenue from subscription video services, we estimate monthly ARPU for video services to be the same as monthly ARPU for all services. As noted above, AT&T and Verizon do not provide estimates of ARPU for their Wireline segments, which include their video services, so data are not available to calculate this performance metric.

⁴⁹⁸ One reason for telephone MVPDs not providing ARPU estimates for their wireline segments may be that the wireline segment contains an amalgamation of two systems (an older system using traditional copper wire and circuit switches and the newer using fiber and IP technology) with a migration of customers and services from one system to the other.

⁴⁹⁹ Monthly ARPU data for cable MVPDs and individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁵⁰⁰ ARPU data are for DIRECTV's U.S. Segment (i.e., excluding the Latin America Segment). DIRECTV 2006 Form 10-K at 48; DIRECTV 2007 Form 10-K at 47; DIRECTV 2008 Form 10-K at 49; DIRECTV 2009 Form 10-K at 55; DIRECTV 2010 Form 10-K at 42.

⁵⁰¹ DISH Network 2010 Form 10-K at 41.

⁵⁰² SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition at 14.

Table 10: Monthly ARPU for Video Services

Year	2006	2007	2008	2009	2010
Cable ⁵⁰³	\$52.20	\$57.20	\$61.40	\$64.10	\$66.40
Comcast	\$60.10	\$65.60	\$68.40	\$71.00	\$73.20
Time Warner Cable	\$47.40	\$63.60	\$66.20	\$68.90	\$72.30
Charter	\$50.20	\$55.40	\$63.20	\$65.90	\$69.20
Cablevision	\$69.80	\$74.00	\$79.20	\$83.20	\$84.60
Suddenlink	\$33.10	\$45.20	\$51.70	\$54.50	\$57.20
Mediacom	\$52.40	\$55.00	\$58.70	\$61.40	\$62.90
DBS					
DIRECTV ⁵⁰⁴	\$73.70	\$79.10	\$83.90	\$85.50	\$89.70
DISH Network ⁵⁰⁵	\$62.80	\$65.80	\$69.30	\$70.00	\$73.30

d. Investment

150. For the five-year period from 2006 to 2010, cable MVPDs invested \$67.3 billion in infrastructure.⁵⁰⁶ For cable MVPDs, capital expenditures peaked from 2000 to 2002 when many cable MVPD system upgrades occurred.⁵⁰⁷ Cable MVPD capital spending has fallen since then and has fluctuated within the \$10 billion to \$12 billion range over the past five years as capital investments have shifted from upgrades to capital tied to increased revenue streams (*e.g.*, providing upgraded set-top receivers to new subscribers of advanced services) and capital tied to expansion of MVPD services to businesses.⁵⁰⁸ According to NCTA, cable MVPD infrastructure expenditures were \$12.4 billion in 2006, \$14.6 billion in 2007, \$14.6 billion in 2008, \$13.3 billion in 2009, and \$12.4 billion in 2010.⁵⁰⁹ DBS MVPDs needed to construct and launch new satellites to expand their offerings of new programming and services.⁵¹⁰ DISH Network expanded its channel capacity by launching two more satellites in 2010.⁵¹¹

⁵⁰³ Monthly video ARPU data for cable MVPDs and individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁵⁰⁴ ARPU data are for DIRECTV's U.S. Segment (*i.e.*, excluding the Latin America Segment). DIRECTV 2006 Form 10-K at 48; DIRECTV 2007 Form 10-K at 47; DIRECTV 2008 Form 10-K at 49; DIRECTV 2009 Form 10-K at 55; DIRECTV 2010 Form 10-K at 42.

⁵⁰⁵ DISH Network 2010 Form 10-K at 41.

⁵⁰⁶ NCTA 6/8/11 Comments at 10.

⁵⁰⁷ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 16.

⁵⁰⁸ *Id.* at 12, 16; SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 83.

⁵⁰⁹ NCTA 6/8/11 Comments at 10.

⁵¹⁰ DIRECTV 2010 Form 10-K at 21.

⁵¹¹ DISH Network, *2010 Annual Report*, Letter to Shareholders.

Between 2006 and 2010, Verizon and AT&T invested billion of dollars upgrading their systems enabling them to provide MVPD video service. Verizon expected to invest \$23 billion from 2004 to 2010 deploying its FiOS network.⁵¹²

c. Profitability

151. In reporting profitability, MVPDs often combine revenues and costs from multiple services.⁵¹³ For example, cable MVPDs that offer video, Internet access, and telephone services often combine the revenues and costs of these services to estimate profitability. As such, for cable MVPDs we are not able to separate out profitability metrics for video services only. In contrast, DBS MVPDs focus on video services and derive the vast majority of their revenue and profits from video services. Thus, estimates of DBS profitability can be interpreted as profits from video services. Telephone MVPDs, especially the two largest telephone MVPDs that account for the overwhelming majority of telephone MVPD video subscribers, combine revenues and costs from video, Internet access, and telephone services from both their upgraded wireline systems and their legacy wireline systems.⁵¹⁴ Because they combine a range of services from two systems, we cannot estimate any meaningful metric for telephone MVPD profits that relate to video services only.

152. SNL Kagan reports that, despite cable MVPDs continued losses in video subscribers, all the advanced service segments (e.g., digital cable, Internet, and telephone) continue to grow.⁵¹⁵ The result, according to SNL Kagan, has been higher per-subscriber revenues and strong overall financial results for cable MVPDs over the past five years from 2006 to 2010.⁵¹⁶ Comcast reports that it has had “terrific momentum in our operating and financial performance. In 2010, we had solid growth in consolidated revenue, operating cash flow, and operating income.”⁵¹⁷ Comcast explains that its free cash flow climbed 22 percent – its third straight year of 20 percent-plus free cash flow growth.⁵¹⁸ DIRECTV states, “We had a terrific year in 2010, as we excelled in every important category, beating our plans for subscriber growth, revenue and cash flow.”⁵¹⁹ DIRECTV explains that it is now a \$24 billion business with free cash flow for the full year at \$2.8 billion, growing at 18 percent, and its operating profit before depreciation and amortization grew 20 percent, finishing 2010 at \$6.4 billion.⁵²⁰

153. The conventional measure of financial performance for cable MVPDs has been operating cash flow, defined as earnings before interest, taxes, and depreciation and amortization expense (EBITDA).⁵²¹ Estimates of operating cash flow for a sample of MVPDs are shown in Table 11. SNL

⁵¹² Verizon 5/20/09 Comments at 6.

⁵¹³ Profit is defined as revenue minus costs, although its measurement may vary in different contexts. See Donald S. Watson & Mary A. Holman, PRICE THEORY AND ITS USES 144 (Houghton Mifflin Company) (4th ed. 1977). See also Brian Butler, A DICTIONARY OF FINANCE AND BANKING 280-81 (Oxford University Press) (2nd ed. 1997) (stating that it is not always possible to derive one single figure for profit for an organization from an accepted set of data). See also Vogel at 336, Table 8.3 (showing select cable MVPD operating revenues and expenses).

⁵¹⁴ Verizon, 2010 Annual Report, at 25.

⁵¹⁵ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 2.

⁵¹⁶ *Id.*

⁵¹⁷ Comcast, 2010 Annual Review, Letter to Shareholders.

⁵¹⁸ *Id.*

⁵¹⁹ DIRECTV, 2010 Annual Report, Message to Shareholders.

⁵²⁰ *Id.*

⁵²¹ Vogel at 339-43. See also SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

Kagan explains that from 2006 to 2010, despite basic video subscriber losses and weaker subscriber trends during the housing downturn, a combination of price increases and growth in subscriptions to digital video services and Internet access and telephone services have enabled cable MVPDs to maintain operating margins (defined as operating cash flow divided by revenue) in the upper 30 percent range.⁵²² According to SNL Kagan, Cablevision and Comcast have led their peers with operating margins averaging about 40 percent from 2006 to 2010.⁵²³ Over the same period, Verizon reported for its Wireline segment an operating margin (EBITDA margin) averaging about 22 percent.⁵²⁴ Although DIRECTV exhibited steady growth in operating cash flow from 2006 to 2010, DISH Network's numbers grew from 2006 to 2008, declined in 2009, then rebounded in 2010. AT&T did not report EBITDA and Verizon only reported EBITDA for its Wireline segment for 2008, 2009, and 2010.

Table 11: MVPD Operating Cash Flow (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁵²⁵					
Comcast	\$10.6	\$12.2	\$13.2	\$13.7	\$14.6
Time Warner	\$5.2	\$5.8	\$6.2	\$6.5	\$6.9
Charter	\$1.9	\$2.1	\$2.3	\$2.5	\$2.6
Cablevision	\$1.6	\$1.8	\$2.0	\$2.1	\$2.2
Suddenlink	\$0.3	\$0.4	\$0.5	\$0.6	\$0.6
Mediacom	\$0.4	\$0.5	\$0.5	\$0.5	\$0.5
DBS					
DIRECTV ⁵²⁶	\$3.2	\$3.6	\$3.9	\$4.4	\$5.2
DISH Network ⁵²⁷	\$2.4	\$2.8	\$2.9	\$2.3	\$3.0
Telephone					
Verizon ⁵²⁸	NA	NA	\$11.3	\$9.8	\$9.2

⁵²² SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

⁵²³ *Id.*

⁵²⁴ Verizon reported a wireline segment EBITDA margin of 25.4 percent in 2008, 23.1 percent in 2009, and 22.4 percent in 2010. Verizon, *2010 Annual Report*, at 27.

⁵²⁵ EBITDA estimates for individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁵²⁶ DIRECTV does not provide EBITDA estimates, so we report net cash provided by operating activities. DIRECTV 2010 Form 10-K at 33; DIRECTV 2008 Form 10-K at 41. Estimates for DIRECTV include both DIRECTV U.S. and DIRECTV Latin America.

⁵²⁷ EBITDA estimates for DISH Network come from DISH Network 2010 Form 10-K at 48, 53; DISH Network 2008 Form 10-K at 44, 50.

⁵²⁸ Verizon reported EBITDA for its wireline segment in 2008, 2009, and 2010, but did not report EBITDA in 2006 and 2007. Verizon, *2010 Annual Report*, at 27.

154. In recent years, however, analysts have favored estimating free cash flow, *i.e.*, the cash that is available to the company for purposes other than new system construction.⁵²⁹ Free cash flow has emerged as an increasingly relevant metric for financial health as the capital investments of cable MVPDs have shifted from system upgrades to capital expenditures (*e.g.*, set-top boxes with HD and DVR features) tied to increased revenue streams.⁵³⁰ Table 12 shows free cash flow for a sample of MVPDs. AT&T did not report free cash flow. Verizon reported free cash flow for 2008, 2009, and 2010 but its estimates include both its wireless and wireline segments, so the numbers shed little light on the financial performance of its FiOS video services.

Table 12: MVPD Free Cash Flow (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁵³¹					
Comcast	\$2.6	\$2.3	\$3.7	\$4.4	\$4.9
Time Warner	\$0.7	\$1.0	\$1.7	\$1.9	\$2.3
Charter	(\$0.8)	(\$0.9)	(\$0.9)	(\$0.6)	\$0.7
Cablevision	\$0.0	\$0.2	\$0.5	\$0.8	\$0.9
Suddenlink	(\$0.1)	\$0.0	\$0.1	\$0.1	\$0.0
Mediacom	\$0.0	\$0.0	\$0.0	\$0.1	\$0.1
DBS					
DIRECTV ⁵³²	\$1.2	\$1.0	\$1.7	\$2.4	\$2.8
DISH Network ⁵³³	\$0.9	\$1.2	\$1.2	\$1.2	\$0.9
Telephone					
Verizon ⁵³⁴	NA	NA	\$10.3	\$14.5	\$16.9

⁵²⁹ Vogel at 340. SNL Kagan defines free cash flow as EBITDA less capital expenditures, cash paid for interest and taxes, and changes in working capital. SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

⁵³⁰ *Id.*

⁵³¹ Free cash flow estimates for individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁵³² Free cash flow estimates for DIRECTV come from DIRECTV 2010 Form 10-K at 33; DIRECTV 2008 Form 10-K at 41. Estimates for DIRECTV include both DIRECTV U.S. and DIRECTV Latin America.

⁵³³ Free cash flow estimates for DISH Network come from DISH Network 2010 Form 10-K at 58; DISH Network 2008 Form 10-K at 54.

⁵³⁴ Verizon reported free cash flow for 2008, 2009, and 2010, but did not report free cash flow for 2006 and 2007. Verizon's free cash flow estimates include all segments (*i.e.*, both wireless and wireline). Verizon, *2010 Annual Report*, at 31.

B. Broadcast Television Stations

1. Introduction

155. This Report considers broadcast television stations as a separate group. Broadcast stations package video programming and deliver it directly over the air to those consumers who do not subscribe to an MVPD as well as MVPD subscribers who own television sets that are not connected to an MVPD service. Broadcast television station programming is also an input for MVPD services.

156. Broadcast stations cater to two distinct sets of customers: audiences and advertisers.⁵³⁵ They seek to provide desirable content to attract and maximize their audiences. In turn, they primarily derive revenues by selling time during their broadcasts to advertisers based on the size and demographic characteristics of the audiences they reach.⁵³⁶ Individual commercial stations compete primarily with other commercial broadcast stations within their local markets (DMAs)⁵³⁷ for audiences and advertising revenue. Noncommercial stations, while not relying on advertising revenues, compete with commercial stations for viewers. Other media, including daily newspapers, local and national cable networks, and the Internet earn advertising revenues by attracting audiences within the geographic areas they serve.⁵³⁸ Broadcast stations' advertising revenues depend on viewership of their television programs, whether received by consumers over the air or via an MVPD. Today, broadcast stations are turning to additional revenue sources, including retransmission consent fees, ancillary digital television revenues, and advertising sold on their web sites.⁵³⁹ Noncommercial broadcast stations rely on underwriters, viewer donations, and government funding for their operations, and also seek to attract audiences as a way to increase their revenues from these sources.

157. On June 12, 2009, full-power television stations completed a transition from analog to digital service pursuant to a statutory mandate.⁵⁴⁰ Digital broadcasting gives broadcast stations greater flexibility. Instead of sending one analog program signal, broadcast stations can use digital technology to offer high definition ("HD") programming, provide multiple streams of programming, and/or distribute

⁵³⁵ Advertisers and audiences are mutually dependent. Television stations need to attract audiences in order to earn money from advertising. They need advertising revenues in order to make investments in programming that will attract audiences. See David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, COMPETITION POL'Y INT'L 151, 155-56 (2007) (discussing the economics of two-sided platforms and its application to competition policy issues especially as it relates to advertising-supported media).

⁵³⁶ "[B]roadcasting in any and all of its forms is an audience aggregation business." See Vogel, *supra*, n. 463, at 288.

⁵³⁷ Under Commission rules, broadcast television stations serve a community of license. See *supra*, n. 148.

⁵³⁸ See, e.g., Nexstar Broadcasting Group, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1, 5 ("Nexstar 2010 Form 10-K"); Sinclair Broadcast Group, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 4, 21 ("Sinclair 2010 Form 10-K").

⁵³⁹ Gray Television, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 3-4 ("Gray 2010 Form 10-K"); Sinclair 2010 Form 10-K at 4-5; LIN Television Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 8-10 ("LIN 2010 Form 10-K").

⁵⁴⁰ 47 U.S.C. §309(j)(14)(A). Full-power analog television service therefore has terminated. See, e.g., *Pending Applications and Pleadings Related to Proceedings for New Analog Full-Power Television Stations for Communities in Several States*, Order, 26 FCC Rcd 14301, ¶ 1 (Video Div., MB 2011). Low-power stations are not required to complete their digital conversion until September 1, 2015. See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Second Report and Order, 26 FCC Rcd 10732, 10733, ¶ 2 (2011).

programming to mobile devices. With multicasting,⁵⁴¹ stations can provide a diverse array of programming to the audience within a DMA.⁵⁴² In addition, stations may affiliate their multicast streams with established networks to give viewers in smaller markets more over-the-air viewing options.

2. Broadcast Television Industry Structure

158. Consistent with our discussion of the MVPD industry, a key element of our analysis of video competition in the broadcast television industry includes industry structure. In this section of the Report, we describe critical elements of the broadcast television industry. We then explain horizontal concentration and vertical integration in the market. Next, we describe conditions effecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry in the market.

159. The broadcast television station group consists of commercial and noncommercial, full-power, Class A, and low-power stations.⁵⁴³ The Commission licenses broadcast television stations to both individual and group owners to serve local communities within DMAs.

160. Nationally, the number of broadcast stations has changed little since the last report, although the relative mix of VHF and UHF stations has changed due in large part to the transition to digital television. As of December 31, 2010, there were 1,022 commercial UHF stations and 368 commercial VHF stations in the United States. In addition, there were 284 noncommercial educational UHF stations and 107 noncommercial educational VHF stations. There were also 7,240 television translators, Class A stations, and low power television stations.⁵⁴⁴

⁵⁴¹ Multicasting allows broadcast stations to offer digital streams or channels (*i.e.*, digital multicast signals) of programming simultaneously, using the same amount of spectrum previously required for analog programming. See FCC, *DTV: What is DTV?*, <http://www.dtv.gov/whatisdtv.html>.

⁵⁴² For example, Bounce TV is a network targeting African Americans and Retro Television features classic television programs. See Bounce Media, LLC, *FAQs: What is Bounce TV?*, <http://www.bouncetv.com/faq/bounce-tv/what-is-bounce-tv.html> (visited Feb. 27, 2012); Retro Television, Inc., *RTI Shows*, <http://myretrotv.com/shows.html> (visited Feb. 27, 2012). Under Commission rules, digital stations asserting must-carry rights are entitled to carriage only of a single programming stream and other programming-related content on that stream. See *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Red 2598, 2622, ¶ 57 (2001).

⁵⁴³ In this Report, we focus on commercial, full-power broadcast stations because of their impact on competition in the market for the delivery of video programming and the limitations on available data for other types of stations.

⁵⁴⁴ A television translator station rebroadcasts the programs of a full-power television broadcast station. Television translator stations typically serve communities that cannot receive the signals of free over-the-air television stations because they are too far away from a full-power television station or because of geographic limitations. See, e.g., FCC Consumer Advisory: The DTV Transition and LPTV/Class A and Translator Stations, <http://www.fcc.gov/cgb/consumerfacts/DTVandLPTV.html>. In 2000, the Commission established the Class A television service to implement the Community Broadcasters Protection Act of 1999. See Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, § 5008, 113 Stat. 1501, 1501A-594-98 (1999) (codified as amended at 47 U.S.C. § 336(f)). Thus, certain qualifying low-power television (LPTV) stations are accorded Class A status, which indicates that these stations have “primary” status as television broadcasters and have a measure of interference protection from full service television stations. Pursuant to Commission rules, stations eligible for this status must provide locally originated programming, often to rural and certain urban communities that have little or no access to such programming. See *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Red 6355, 6357, ¶ 1 (2000). Created by the Commission in 1982, low-power television service has been a secondary spectrum priority. See *Inquiry Into the Future Role of Low-power Television Broadcasting and Television Translators in the National Telecommunications System*, Report and Order, BC Docket No. 78-253, (continued....)

Table 13: Total Full Power Broadcast Television Stations by Year⁵⁴⁵

Station Type	Date				
	12/31/06	12/31/07	12/31/08	12/31/09	12/31/10
UHF Commercial	789	796	796	1,019	1,022
VHF Commercial	587	583	582	373	368
Total	1,375	1,379	1,378	1,392	1,390
UHF Noncommercial	252	252	252	283	284
VHF Noncommercial	128	128	129	107	107
Total	380	380	381	390	391
Grand Total	3,512	3,518	3,518	3,564	3,562

161. Since the last report, the broadcast television industry completed its transition to digital service in 2009. Broadcast television stations have begun offering more programming than ever before, including both HD signals and standard-definition (SD) multicast signals.⁵⁴⁶ NAB states that at the end of 2008, about one-third of broadcast television stations delivered programming on a secondary channel.⁵⁴⁷ After the switch to digital television in 2009, the majority of full-power stations were multicasting – more than 60 percent.⁵⁴⁸ As of December 2010, about 71 percent of the 1,196 total commercial stations SNL Kagan surveyed were multicasting, representing an increase of 1,240 multicast signals since 2009, for a total of 2,518 multicast signals as of 2010.⁵⁴⁹ In addition, SNL Kagan analyzed 349 noncommercial stations and found that approximately 83 percent were multicasting as of December 2010.⁵⁵⁰ To continue to receive over-the-air broadcasting, viewers had to obtain a digital converter box for their analog television set or purchase a digital television set. Nielsen estimates that as of August 2009, about 0.6 percent of U.S. households with television sets were unable to receive digital television signals, either over-the-air or via MVPD service.⁵⁵¹

162. The geographic area applicable for competition among broadcast television stations is the DMA because consumers view alternative stations that are available to them in the areas where they live. The level of broadcast television station competition within a DMA varies. While the size of television markets and number of stations that Nielsen assigns to each DMA are not directly correlated, larger
(Continued from previous page)

51 Rad. Reg. 2d (P & F) 476, 486 (1982), *aff'd sub nom. Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984).

⁵⁴⁵ See FCC, *Licensed Broadcast Station Totals*, <http://transition.fcc.gov/mb/audio/BroadcastStationTotals.html>.

⁵⁴⁶ See, e.g., Comcast 6/8/11 Comments at 3; NAB 6/8/11 Comments at 5.

⁵⁴⁷ NAB 6/8/11 Comments at 21 (citing SNL Kagan). See also SNL Kagan, *TV Stations Deals Databook*, 2011 Edition, at 7 (2011) (“2011 SNL Kagan TV Stations Databook”).

⁵⁴⁸ 2011 SNL Kagan TV Stations Databook at 7.

⁵⁴⁹ *Id.* at 6-7. See also Justin Nielson, *TV Stations Multiplatform Analysis '11 Update: Multicasting Expands Programming Options, Mobile TV Goes Live*, SNL Kagan, Jan. 28, 2011, at 3-4. Moreover, as of year-end 2010, 60 commercial mobile digital television (“mobile DTV”) stations were broadcasting more than 80 live video channels in several major cities. For a more detailed discussion of mobile DTV, see *infra*, Sec. III.B.3.b.

⁵⁵⁰ See also 2011 SNL Kagan TV Stations Databook at 7. Of those total digital noncommercial stations covered, 262 are affiliated with PBS. *Id.*

⁵⁵¹ *The Digital Transition: Update on the Digital Readiness of U.S. Households*, Nielsen, Sept. 8, 2009, at 1. Nielsen stopped tracking the readiness of U.S. television households after the digital transition was completed.

markets tend to have more full-power stations than smaller markets. For example, Los Angeles, the number-two ranked DMA by number of television households, has 23 full-power television stations, more than any other market.⁵⁵² Nine television markets, including Harrisonburg, Virginia, ranked 177, have only one full-power television station.⁵⁵³

163. Programming is a critical input for broadcast television stations to effectively compete in the industry. Stations combine local programming, either produced in-house or acquired from independent sources, syndicated programming and/or network programming. The mix of programming varies by station, and depends on whether the station is affiliated with a network or operates as an independent station.⁵⁵⁴ Whether or not a station is affiliated with one of the four major networks (ABC, CBS, FOX, or NBC) has a significant impact on the composition of the stations' revenues, expenses, and operations.⁵⁵⁵

164. In 2011, most full-power commercial stations (about 1,145 out of 1,196 total full-power commercial stations) got at least some of their programming from broadcast networks on their primary signals.⁵⁵⁶ Commercial broadcast networks generally fall into five main categories: English-language (e.g., ABC, CBS, FOX, NBC, The CW, and MyNetworkTV); Spanish-language (e.g., Univision, Telemundo, and TeleFutura); shopping (e.g., HSN), religious (e.g., TBN and CTN), and regional specialty networks (e.g., Memorable Entertainment Television). Three of the major networks (ABC, CBS, and NBC) generally provide their affiliates with about 22 hours per week of prime time programming.⁵⁵⁷ FOX, MyNetworkTV, and The CW supply affiliates with up to 15 hours per week of prime time programming.⁵⁵⁸ In addition, these networks may supply affiliates with daytime programming, e.g., morning news programs, game shows, talk shows (including Sunday public affairs),

⁵⁵² BIA Financial Network, Inc. ("BIA"), *Broadcast Television Station* database. The Los Angeles DMA had 5.7 million television households as of the 2010-2011 television season. See *Local Television Market Universe Estimates*, Nielsen, Sept. 25, 2010 ("Nielsen 2010-11 Local Market Estimates"). Estimates were effective as of January 1, 2011, and used throughout the 2010-2011 television season. Nielsen estimates several measurements, including the number of television households within each DMA, by broadcast television seasons, which run from September through August.

⁵⁵³ BIA, *Broadcast Television Station* database. The Harrisonburg DMA had 94,700 television households as of the 2010-2011 television season. See Nielsen 2010-11 Local Market Estimates. The other eight markets with one full-power television station are: Alpena, Michigan; Glendive, Montana; Lafayette, Indiana; Mankato, Minnesota; North Platte, Nebraska; Parkersburg, West Virginia; Presque Isle, Maine; and Zanesville, Ohio.

⁵⁵⁴ The Commission defines broadcast television networks as "any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation." 47 C.F.R. § 73.3613(a)(1). Stations affiliated with a network may be owned and operated by the network (O&Os) or owned by other entities that have agreements with a network for distribution of the network's programming.

⁵⁵⁵ Nexstar 2010 Form 10-K at 5; Gray 2010 Form 10-K at 7. Station groups differ in the importance they ascribe to network affiliation contracts with respect to their broadcast licenses. See *infra*, n. 601.

⁵⁵⁶ FCC staff analysis based on 2011 data from BIA, *Broadcast Television Station* database.

⁵⁵⁷ Nexstar 2010 Form 10-K at 14.

⁵⁵⁸ *Id.*

and late night programs. Spanish language and religious networks provide nearly round-the-clock programming for affiliates.⁵⁵⁹

165. Broadcast stations also acquire programming from television syndicators that distribute original (“first-run syndication”), such as *Jeopardy!* and *Judge Judy*, or reruns of network television series (“off-net” syndication), such as reruns of *Seinfeld* and *The Simpsons*, to television stations.⁵⁶⁰ In addition, local broadcast stations produce programming in-house, such as local newscasts, public affairs shows, and coverage of regional and local sporting events.⁵⁶¹

a. Horizontal Concentration

166. *National Group Ownership.* The Act imposes a cap that limits the percentage of television households that one television station group owner can serve at 39 percent of U.S. television households.⁵⁶² Standard & Poor’s estimates that nearly a third of the commercial television stations are owned by and/or affiliated with the top 10 television station groups.⁵⁶³ As of 2010, the largest group owners, by coverage total of U.S. television households, include ION Media Networks (Avenue Capital, Black Diamond Capital, and Trilogy Capital), Univision Communications (Broadcast Media Partners Inc.), Trinity Broadcasting (Paul F. Crouch Sr. and Jan Crouch), CBS Television Stations (CBS Corp.), FOX Television Stations (News Corp.), NBC Universal Stations (Comcast Corp. and General Electric), Tribune Broadcasting (owned by an Employee Stock Ownership Plan), ABC Owned Television Stations (The Walt Disney Company), and Gannett Broadcasting (Gannett Company).⁵⁶⁴ In 2011, Sinclair increased its coverage of U.S. households when it purchased eight broadcast television stations from Freedom Communications, and five full power stations from Four Point Media.⁵⁶⁵ Disney decreased its coverage when in April 2011 it closed the sale of its two smallest stations owned and operated by the

⁵⁵⁹ See, e.g., Entravision Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 6-7 (“Entravision 2010 Form 10-K”); Trinity Broadcasting Network, *Watch Us: Broadcast Schedule*, <http://www.tbn.org/watch-us/broadcast-schedule> (visited Mar. 20, 2012).

⁵⁶⁰ Some firms specialize in one of these functions and form partnerships. For example, Harpo Studios and Sony Pictures Television (“SPT”) co-produce *The Dr. Oz Show* and *The Nate Berkus Show* first-run syndicated series, and SPT licenses them for distribution to television stations. See Harpo Productions, Inc., *Sony Pictures Television to Distribute the Dr. Oz Show* (press release), Oct. 15, 2009; Harpo Productions, Inc., *Harpo, Sony Pictures Television, NBC Local Media to Launch The Nate Berkus Show* (press release), Feb. 1, 2010. Financial arrangements between syndicators and stations vary. Some syndication rights are acquired for a per episode or series fee, but others involve sharing advertising time or barter. Vogel at 212-15. Under a barter agreement, a national program distributor retains a fixed amount of advertising time within the program in exchange for the programming it supplies. The television station may pay a fixed fee for such programming. Gray 2010 Form 10-K at 7; LIN 2010 Form 10-K at 12.

⁵⁶¹ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8.

⁵⁶² 1996 Act, § 202(c); 47 C.F.R. §73.3555(e). See also *infra*, ¶ 178.

⁵⁶³ Tuna N. Amobi & Erik B. Kolb, *Industry Surveys: Broadcasting, Cable & Satellite*, STANDARD & POOR’S, Feb. 18, 2010, at 9.

⁵⁶⁴ Kim McAvoy, *TV Group Ranking Could See Shake-Up in '11*, TVNEWSCHECK, Mar. 30, 2011, <http://www.tvnewscheck.com/article/2011/03/30/50206/tv-group-ranking-could-see-shakeup-in-11#group-19> (visited Jan. 10, 2012).

⁵⁶⁵ Tony Lenoir, *Top 50 Station Groups by U.S. TVHH Coverage: Sinclair up 6 Percentage Points Through Acquisitions*, SNL Kagan, Jan. 31, 2012, at 12.

ABC network ("O&Os") to SJL Broadcast Management Corporation.⁵⁶⁶ The top ten station groups remained the same.

167. *Local Duopolies.* Commission rules limit the number of broadcast television stations that a single entity can own within a DMA based on the number of independently owned stations in the market.⁵⁶⁷ The local television ownership limit permits a single entity to own two television stations in the same local market if (1) the so-called "Grade B" contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share and at least eight independently owned and operating commercial or noncommercial full-power broadcast television stations would remain in the market after the combination.

168. Using BIA data and counting stations in the same market with a common parent, we find that as of 2012, there are about 124 duopolies among commonly owned stations in the United States and an additional 59 duopolies among stations operating pursuant to local marketing agreements.⁵⁶⁸ Broadcast stations owned-and-operated by parents of multiple broadcast networks are generally more likely than other stations to participate in duopolies. Through the dual network rule, the Commission limits the extent to which broadcast television licensees can affiliate with broadcast networks under common ownership.⁵⁶⁹ The dual network rule effectively permits common ownership of multiple broadcast networks, but prohibits a merger of two out of the "top four" networks (*i.e.*, ABC, CBS, FOX, and NBC). Univision Corporation, Inc., which owns the Univision and TeleFutura broadcast networks, operates 13 duopolies; CBS Corp., which has ownership interests in the CBS and The CW networks, has 10 duopolies; News Corp., which owns the FOX and MyNetwork TV networks, has nine duopolies; Comcast/NBCUniversal ("Comcast/NBCU"), which owns the NBC and Telemundo broadcast networks, operate six duopolies. In contrast, Disney Corp., whose sole broadcast network is ABC, does not operate any duopolies.

169. Large television group owners with major broadcast network affiliates are also more likely to operate duopolies. Sinclair which owns 59 full-power stations as of 2012 is involved in more duopolies than any other station group, with 12 co-owned duopolies and ten LMAs. LIN operates nine duopolies of co-owned stations and is involved in two LMAs. Belo Corp. and Newport Television LLC operate five duopolies each. Cox Media Group, Hearst Television Inc., and the Tribune Company each operate four duopolies.

⁵⁶⁶ *Ch. 13's New Owners Cut 20-Plus Jobs*, TOLEDoblADE.COM, Apr. 12, 2011, <http://www.toledoblade.com/TV-Radio/2011/04/12/Ch-13-s-new-owners-cut-20-plus-jobs.html> (visited Apr. 26, 2012).

⁵⁶⁷ See 47 C.F.R. § 73.3555(b). See also *infra*, ¶ 178. In the context of the Media Ownership proceeding, the Commission is considering revising this rule. See *2010 Quadrennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996: Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17493, 17498-511, ¶¶ 8, 25-59 (2011) ("Media Ownership NPRM").

⁵⁶⁸ Commission staff estimates based on BIA, *Broadcast Television Station* database. For purposes of this FCC staff estimate, we count full-power stations within a DMA that have a common parent company (*i.e.*, co-owned) as a duopoly. We also count local marketing agreements (LMAs), if the programmer under its ownership limits provides more than 15 percent of a station's weekly broadcast programming. See 47 C.F.R. § 73.3555 note 2(j). For the purposes of this Report, the Commission has not verified the BIA data.

⁵⁶⁹ 47 C.F.R. § 73.658(g).

170. There is at least one duopoly in 71 markets as of 2012.⁵⁷⁰ While larger DMAs tend to have a greater number of duopolies, smaller DMAs have duopolies as well. Three top ranked markets have four duopoly combinations: Los Angeles, Dallas-Ft. Worth, and San Francisco-Oakland-San Jose.⁵⁷¹ Smaller markets are more likely to have LMAs than co-owned stations. Six markets ranked below 100 have co-owned duopolies, while 25 markets ranked below 100 have LMAs. The smallest market with a duopoly is Victoria, Texas, ranked 204.

b. Vertical Integration

171. Some stations are vertically integrated upstream, with suppliers of programming, as well as downstream, with distributors of programming. For instance, the stations' parent company may have ownership interests in television production studios, movie studios, sports teams, broadcast television networks, cable networks, or syndicators.

172. The parent companies of six of the top seven station groups—ION Media Networks, Univision Communications, Inc., CBS Television Stations, FOX Television Stations, NBC Universal Stations, and ABC Owned Television Stations, representing 185 owned and operated local broadcast stations ("O&Os"), own all or part of at least one broadcast television network. Broadcast networks typically own and operate their own stations in the largest television markets. Spanish-language broadcast networks, e.g., Univision and Telemundo, own and operate television stations in the largest Spanish-speaking markets.

173. In addition to ownership of broadcast networks, a number of owners of local broadcast stations have affiliations with cable networks.⁵⁷² Through its NBC Universal joint venture with the General Electric Company, Comcast has ownership interests in 31 cable networks. Other broadcast station owners with affiliated cable networks are: The Walt Disney Company with interests in 21 cable networks; News Corp. with interests in 12 cable networks; Univision with interests in six affiliated cable networks; and CBS Corporation with interests in three cable networks.⁵⁷³ Several broadcast television groups owners, while not vertically integrated with broadcast networks, also have ownership interests in cable networks. These owners include Hearst Television Inc. (17 cable networks) and InterMedia Partners (three cable networks). In addition, Tribune Company, Cox Communications Inc., and Hubbard Broadcasting Corp. have ownership interests in two cable networks each. Combined, Hearst, InterMedia, Tribune, Cox, and Hubbard, own 83 stations. Other broadcast station groups operate local and regional cable news channels. For example, Belo Corp. owns 20 television stations, two local and two regional cable news channels, and holds ownership interests in two other cable news channels while Allbritton own eight television stations and one regional cable news network.⁵⁷⁴

⁵⁷⁰ BIA, *Broadcast Television Station* database. In addition, San Juan, Puerto Rico, which is not part of any DMA, has six television station combinations.

⁵⁷¹ These markets are ranked one, two, five, six, and twelve respectively as of the 2010-2011 television season.

⁵⁷² This is not the case with syndicators. Columbia/Tristar (Sony), the only major syndicator unaffiliated with a broadcast network, does not own television stations.

⁵⁷³ Comcast, Viacom, News Corp., and The Walt Disney Company also control production studios, which are the primary source of programming for their networks, and hold ultimate distribution rights for their programming, subject to contractual negotiations. See *infra*, Sec. V.A.

⁵⁷⁴ Belo Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 3 ("Belo 2010 Form 10-K"); Allbritton Communications Co., *TBD: About Us*, <http://www.tbd.com/about/> (visited Mar. 20, 2012). See also *infra*, Appendix C, Table C-2.

174. Both Viacom and E.W. Scripps have split their broadcast television station groups and cable network holdings into separate corporate entities.⁵⁷⁵ Because their station groups and cable networks have common corporate directors, however, we consider them to be affiliated.⁵⁷⁶ Counting Viacom's 24 cable networks and CBS's three cable networks, these affiliated companies have interests in 27 cable networks. Including Scripps Networks Interactive, E.W. Scripps has interests in six cable networks.

175. Since the last report, Comcast became the only distributor of video programming with ownership interests in each mode of video distribution covered by this Report: it is an MVPD that owns and operates 25 full-power television stations and maintains an ownership interest in Hulu, an OVD.⁵⁷⁷ News Corp., which also has an ownership interest in Hulu and 27 broadcast television stations, no longer is an MVPD; it divested its interest in DIRECTV in 2008.⁵⁷⁸ Besides Comcast, Cox Media Holdings is the only MVPD that owns broadcast stations, an ABC affiliate serving a DMA where it also owns a cable system.⁵⁷⁹

c. Entry and Exit Conditions

176. Entry and exit in the broadcast television industry occurs within the broadcast television allocation and licensing regime: ownership of television station properties can change hands, licensees may go out of business and return broadcast licenses for reissue by the Commission, or the Commission may auction channels for new broadcast stations. The amount of spectrum authorized exclusively for broadcast television use by the Commission and the allocation of that spectrum across the United States limits the number of entities that can enter and exit the industry. Besides spectrum, programming is another critical input for broadcast television stations. Both regulatory and non-regulatory conditions affecting the availability of programming may impact stations' entry and exit decisions. Stations also require access to capital in order to remain competitive and operational. Below, we first discuss the regulatory conditions potentially affecting entry. Thereafter, we describe the market ("non-regulatory") conditions that may influence entry decisions. We then describe recent entry and exit from the market.

(i) Regulatory Conditions

177. *Licensing of Broadcast Spectrum.* A broadcast station may not operate in the United States without first receiving Commission authorization.⁵⁸⁰ The Commission is thus responsible for

⁵⁷⁵ See Viacom Inc., *CBS Separation*, <http://www.viacom.com/investorrelations/Pages/separationfromcbs.aspx> (visited Feb. 14, 2012); E.W. Scripps Co., *Scripps Controlling Class of Shareholders Approves Company's Planned Separation* (press release), June 13, 2008.

⁵⁷⁶ Scripps Networks Interactive (owner of cable networks) has 10 members of the board of directors and E.W. Scripps (owner of broadcast stations) has nine members. Of those, three directors on the boards of both companies: Nackey E. Scagliotti (Chairman of E.W. Scripps), John H. Burlingame, and Mary McCabe Peirce. Likewise, Viacom Inc. has 11 board members and CBS Corporation has 14 members. Their boards share three members: Sumner Redstone (Chairman of both boards), Shari E. Redstone (Vice Chairman of both boards), and Frederic V. Salerno.

⁵⁷⁷ Comcast's cable systems overlap with NBC Universal's stations in six markets: San Francisco, Philadelphia, Chicago, Miami, Hartford, and Washington, DC. *Comcast-NBCU Order*, 26 FCC Rcd at 4289, ¶ 126 n. 302.

⁵⁷⁸ See *News Corp-DirectTV Order*, *supra* n. 101.

⁵⁷⁹ In the Orlando-Daytona Beach-Melbourne DMA, Cox owns television stations WFTV and WRDQ, as well as a cable system serving Ocala, Florida. See Cox Media Group, *Orlando*, <http://www.coxmediagroup.com/orlando/> (visited Jan. 11, 2012); Cox Communications, Inc., *Welcome*, <http://ww2.cox.com/> (visited Jan. 11, 2012).

⁵⁸⁰ 47 U.S.C. § 301.

licensing broadcast spectrum to respective applicants and ensuring that the spectrum is used to serve the public interest.⁵⁸¹ Courts have consistently held that the Commission retains significant discretion under its public interest standard to approve applications for broadcast spectrum licenses.⁵⁸² The Act prohibits broadcast stations from transferring control of their licenses without obtaining Commission approval.⁵⁸³ Certain obligations are imposed on licensees during each license term, which is generally eight years.⁵⁸⁴

178. *Ownership Limits.* The Commission has adopted several rules limiting the ownership interests of broadcasters.⁵⁸⁵ These rules were adopted to further the Act's goals of competition, localism, and diversity.⁵⁸⁶ The Commission's broadcast ownership rules limit local television ownership, local radio ownership, newspaper/broadcast cross-ownership, radio/television cross-ownership, and dual network ownership.⁵⁸⁷ The local television ownership rule permits a single entity to own two television stations in the same market only if certain conditions are met.⁵⁸⁸ The newspaper/broadcast cross-ownership rule prevents the common ownership of a radio or television broadcast station and a daily newspaper where the station's broadcast signal encompasses the entire community where the newspaper is published.⁵⁸⁹ The radio/television cross-ownership rule restricts the common ownership of radio and television broadcast stations in a single market after factoring in the size of the relevant market.⁵⁹⁰ Congress mandates that the Commission review its media ownership rules every four years to determine

⁵⁸¹ 47 U.S.C. §§ 303(c), 308(a), 309(a).

⁵⁸² See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) ("In choosing among applicants, the Commission was to be guided by the 'public interest, convenience, or necessity[.]' . . . The statutory standard no doubt leaves wide discretion and calls for imaginative interpretation."); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) ("In granting or withholding permits for the construction of stations, and in granting, denying modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.").

⁵⁸³ 47 U.S.C. § 310(d).

⁵⁸⁴ 47 U.S.C. § 307(c); 47 C.F.R. § 73.1020. Among other things, each licensee is required to maintain a main studio in its communities of license (47 C.F.R. § 73.1125(a)), maintain and carry out an equal opportunity program (47 C.F.R. § 73.2080), and maintain an accessible public inspection file (47 C.F.R. §§ 73.3526-27).

⁵⁸⁵ 47 C.F.R. §§ 73.3555(a)-(c), 73.658(g). The Commission also has developed rules to attribute both direct and indirect ownership in broadcast licenses, cable television systems, and daily newspapers in order to enforce its media ownership rules. Among other parties, these rules apply to investment companies; limited partnerships; officers and directors of a broadcast licensee, cable television system or daily newspaper; and entities participating in local marketing agreements. 47 C.F.R. § 73.3555 notes 1-2. Moreover, the Communications Act limits the extent on non-U.S. ownership of companies that own U.S. broadcast stations. Under this restriction, a U.S. broadcast company may have no more than 25 percent non-U.S. ownership (by vote and equity). 47 U.S.C. § 310(b)(4).

⁵⁸⁶ *Media Ownership NPRM*, 26 FCC Red at 17494-96, ¶¶ 10-17.

⁵⁸⁷ See *supra*, n. 585.

⁵⁸⁸ 47 C.F.R. § 73.3555(b). Similarly, the local radio ownership rule limits the number of commercial radio stations one entity may own in a local market. 47 C.F.R. § 73.3555(a).

⁵⁸⁹ 47 C.F.R. § 73.3555(d). In the *Media Ownership NPRM*, the Commission proposed relaxing this rule for the top 20 DMAs, provided that the television station is not ranked among the top four, and eight independently owned major media voices remain with the DMA. See *Media Ownership NPRM*, 26 FCC Red at 17525-32, ¶¶ 99-116.

⁵⁹⁰ 47 C.F.R. § 73.3555(c).

whether they “are necessary in the public interest as a result of competition.”⁵⁹¹ The Commission is currently conducting such a review.⁵⁹²

179. *Territorial Exclusivity.* The territorial exclusivity rules restrict the geographic area in which a television broadcast station may obtain exclusive rights to video programming. Under the network territorial exclusivity rule, a broadcast station may not have an agreement with a network preventing another station located in a different community from broadcasting any of the network’s programming or preventing another station located in the same community from broadcasting the network’s programs not purchased by the broadcast station.⁵⁹³ Under the non-network territorial exclusivity rule, a broadcast station may not enter into an agreement with a non-network programming distributor that prevents another station located in a community more than 35 miles away from broadcasting the same programming.⁵⁹⁴

180. *Incentive Spectrum Auctions.* On February 22, 2012, President Obama signed legislation providing the Commission with the authority to conduct incentive auctions by which television broadcast licensees could voluntarily relinquish their licensed spectrum or modify their spectrum usage in exchange for a portion of the spectrum auction proceeds.⁵⁹⁵ This legislation provides new financial opportunities for broadcast television station licensees, including relinquishing all usage rights with respect to a particular channel, moving from a UHF to a VHF channel, or sharing a channel with another licensee.⁵⁹⁶ In addition, voluntary channel sharing may provide existing small and minority-owned stations, as well as other niche stations, an opportunity to use the capital infusion they receive from the incentive auction as well as provide operating-cost savings from sharing a transmission facility to enhance or preserve their local program offerings.⁵⁹⁷

(ii) Non-regulatory Conditions

181. The primary means of entering the television broadcast industry is to purchase broadcast properties from licensees who are already operating stations rather than constructing new broadcast station infrastructure and obtaining a new license. Once a licensee takes over operations of an existing station, the new owner may decide to change programming by affiliating with a different network, purchasing new syndicated programming, or changing on-air talent for local programming, such as newscasts, subject to the terms of their contracts.

182. *Access to Capital.* Entities seeking to enter the broadcasting industry either by purchasing properties or launching a new station, require access to capital, which may come in the form of debt or equity financing. In determining whether to lend money or invest in a licensee, banks or other firms look at expected revenues and expenses, especially whether new owners could increase profits by

⁵⁹¹ 1996 Act, § 202(h).

⁵⁹² *Media Ownership NPRM*, *supra*, n. 567.

⁵⁹³ 47 C.F.R. § 73.658(b).

⁵⁹⁴ 47 C.F.R. §§ 73.658(m), 76.53. An exception is made, however, for communities located in hyphenated markets, *i.e.*, television markets that include more than one city (e.g., Dallas-Fort Worth, TX). 47 C.F.R. §§ 73.658(m), 76.51.

⁵⁹⁵ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6401-05, 126 Stat. 156, 222-30 (2012).

⁵⁹⁶ *Id.* at 225.

⁵⁹⁷ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, E.I.* Docket No. 10-235, Report and Order, 27 FCC Red 4616, 4622 ¶ 12 (2012).

changing programming or reducing expenses. Structural changes in the media industry, combined with the strong correlation of their revenues and profits to economic cycles, indicate that financing media transactions with debt entails some risk.⁵⁹⁸ In particular, high interest rates may lead station owners to file for bankruptcy and transfer control to lenders or sell their stations,⁵⁹⁹ while reducing the number of potential station buyers who can obtain loans and service debt without strain.⁶⁰⁰

183. *Programming.* Access to programming also affects the ability of licensees to enter and remain in the industry.⁶⁰¹ Network affiliation agreements and syndication contracts often last several years. For example, if a station loses its network affiliation, it may not be able to affiliate with an alternative network, because that alternative network is likely to already have a distribution agreement in place with another station in the market. The loss of this programming could require the station to obtain replacement programming at a higher cost, and that may be less attractive to its target audience, thereby causing it to lose advertising revenues while potentially increasing expenses. Similarly, popular syndicated programming may not be available for a new station due to exclusive distribution arrangements with competing stations or cable networks.⁶⁰² As an alternative to contracting for expensive third-party programming, stations may produce their own programming in-house or lease time to other parties (e.g., producers of infomercials) willing to pay stations.

(iii) Recent Entry and Exit

184. Overall, between December 31, 2006, and December 31, 2010, the number of full-power commercial television stations on the air increase by 14, bringing the total to 1,390.⁶⁰³ During this period, the total number of full-power noncommercial television stations increased by eleven, going from 380 to

⁵⁹⁸ "The broadcast sector historically has been highly levered. It's the recession's impact on revenues and cash flow that has magnified financial strain." Price Colman, *TV Groups Cope with Leverage Troubles*, TVNEWSCHECK, Mar. 4, 2009, <http://www.tvnewscheck.com/article/2009/03/04/30075/tv-groups-cope-with-leverage-troubles> (visited Jan. 12, 2012). Lenders impose restrictions (covenants) on the ratio of debt to equity and earnings before interest and taxes (EBIT) to interest. LIN 2010 Form 10-K at 23-24; Sinclair 2010 Form 10-K at 23-24; Nexstar 2010 Form 10-K at 12-13; Gray 2010 Form 10-K at 16-17.

⁵⁹⁹ LIN 2010 Form 10-K at 23-24; Sinclair 2010 Form 10-K at 23-24; Nexstar 2010 Form 10-K at 12-13; Gray 2010 Form 10-K at 16-17.

⁶⁰⁰ "[W]hen credit markets froze in 2007, a big no-exit sign was hung over TV broadcasting. The gap between bid and ask is more like a gulf." Price Colman, *Hot Trend: Outsourcing Management*, TVNEWSCHECK, Aug. 25, 2010, <http://www.tvnewscheck.com/article/2010/08/25/44718/hot-trend-outsourcing-station-management> (visited Jan. 12, 2012).

⁶⁰¹ Broadcasters differ in the value they place on programming with respect to a station's purchase price. For example, Gray and LIN believe that the value of a television station is derived primarily from the attributes of its broadcast license, rather than its type of programming, *i.e.*, whether or not it is an affiliate of one of the major four broadcast networks. Gray 2010 Form 10-K at 53-54; LIN 2010 Form 10-K at 38. LIN notes that other companies ascribe a belief that network affiliations are the most important component of a station's value. LIN 2010 Form 10-K at 38.

⁶⁰² Stations compete against in-market broadcast stations for exclusive access to syndicated programming within their markets. In addition, cable networks occasionally acquire programs that might otherwise be offered to stations, and some programs are available via OVDs. Nexstar 2010 Form 10-K at 7; LIN 2010 Form 10-K at 12. Stations usually purchase syndicated programming two to three years in advance, and sometimes must make multi-year commitments. Gray 2010 Form 10-K at 20; Sinclair 2010 Form 10-K at 25.

⁶⁰³ See FCC, *Licensed Broadcast Stations Totals*, <http://transition.fcc.gov/mb/audio/BroadcastStationTotals.html>.

391. In 2009, six stations did not complete the transition to digital television and as a result the Commission canceled their licenses.⁶⁰⁴

185. Furthermore, between 2007 and 2010, the number of television station transactions declined in number and dollar value.⁶⁰⁵ During 2007, 218 full-power television stations traded hands, for a total of \$10.158 billion, or about \$46.6 million per station, with an average 12.5 times the station's cash flow. In 2010, 23 full-power stations traded hands, totaling \$171 million, or \$7.43 million per station, with an average cash flow multiple of 9.3, marking the first time since 1995 that cash flow multiples were in the single digits.⁶⁰⁶ In terms of the dollar value of station transactions, 2010 marked the smallest amount of station transaction activity since 1982.

186. Since the last report, several major group owners have exited the television broadcasting business by selling stations, while private equity and other investment firms have entered. Clear Channel Communications sold all of its television assets, 60 full-power stations, in 2008 to new entrant Newport Television (a holding company formed by private equity firm Providence Equity Partners).⁶⁰⁷ In addition, the New York Times Company exited the broadcast television business in May 2007 when it sold its nine full-power stations to private equity firm Oak Hill Capital Partners. Comcast entered the broadcast television business in 2010 when, as part of its joint venture with General Electric, it purchased majority ownership interests in the NBC and Telemundo O&Os.

187. Since 2006, several broadcaster station groups filed for bankruptcy, primarily impacting stations in smaller and medium-sized markets.⁶⁰⁸ These include Young Broadcasting, the Tribune Company, Pappas Broadcasting, Equity Media, Multicultural Broadcasting, and Johnson Broadcasting. In some cases, banks and financing organizations took control over their stations. For example, in 2009, Young Broadcasting Lenders took over the 14 stations of Young Broadcasting, and New Vision Lenders took over 15 stations from New Vision Television. Station groups that file for bankruptcy do not necessarily exit the industry or cease broadcasting. Some station groups have reorganized and emerged from Chapter 11 proceedings. For example, Freedom Communications, an operator of broadcast television stations, print publications, and interactive businesses, filed for protection in September 2009, and completed its restructuring eight months later.⁶⁰⁹

⁶⁰⁴ WDCP, University Center, MI, did not obtain a construction permit for digital operation; the Commission canceled its analog license. In November 2009, KOFT, Farmington, NM, returned its analog license to the Commission. In February 2008, KBGH, Filer, ID, notified the Commission that it would not transition to digital. In July 2009, after Equity Broadcast Holdings, LLC filed for bankruptcy and failed to find a buyer for the stations KI MN, Great Falls, MT, KMME, Missoula, MT, and KBTZ, Butte, MT, it returned the licenses for the stations to the Commission.

⁶⁰⁵ See Volker Moerbitz, *Freedom Buy Catapults Sinclair to No. 2 in Stations Owned*, SNL Kagan, Nov. 25, 2011, at 6-7.

⁶⁰⁶ 2011 SNL Kagan TV Stations Databook at 13.

⁶⁰⁷ Newport Television, *About Us*, <http://www.newporttv.com/content/aboutus.aspx> (visited Mar. 5, 2012). See also Reuters, *Clear Channel Sale Complete*, MEDIAPOST NEWS, Mar. 17, 2008, <http://www.mediapost.com/publications/article/78604/clear-channel-tv-station-sale-complete.html> (visited Mar. 5, 2012).

⁶⁰⁸ NAB 6.8.11 Comments at 29-30.

⁶⁰⁹ Freedom Communications, *Freedom Communications Emerges from Chapter 11* (press release), Apr. 30, 2010.

3. Broadcast Television Industry Conduct

188. In addition to industry structure, a second key element of our analysis of broadcast television station competition is an examination of the conduct of industry participants – in particular, the business models and competitive strategies of these entities. Broadcast stations derive most of their revenue from local and national advertising by selling on-air time to reach viewers.⁶¹⁰ They differentiate themselves primarily by investing in the purchase and production of programming, as well as making it available to viewers at their convenience. In this section of the Report, we discuss broadcast television station competition in terms of both price and non-price rivalry.

a. Price Rivalry

189. *Price to Consumers.* Because broadcast television stations do not charge consumers directly for the delivery of their signals, they do not compete on price in the traditional sense. Broadcast television is free to consumers who receive it over-the-air. Nevertheless, since about 90 percent of all television households receive broadcast stations from an MVPD, most consumers pay for broadcast stations as part of their MVPD service.⁶¹¹ In the case of cable, broadcast television stations are part of the basic service package, which is generally a low price offering.⁶¹² As of January 1, 2010, the average cable system charged \$17.93 per month, for its basic service tier, which includes 41 channels on average.⁶¹³ As of January 2012, AT&T U-Verse charges \$19 per month for a basic television service including only local channels.⁶¹⁴ As of January 2012, Verizon offers 72 channels as part of its FiOS TV Local Digital plan for \$12.99 per month.⁶¹⁵ DBS providers may charge subscribers an additional fee to receive broadcast television stations. As of January 2012, DIRECTV generally offers local channels at no additional charge as part of its local packages, but eligibility for this offer is based on a customer's service area.⁶¹⁶ As of January 2012, DISH includes local television station services as part of some packages, but charges an additional \$5.99 per month to subscribers opting for local television stations in other packages.⁶¹⁷

⁶¹⁰ We discuss additional sources of revenue further, *infra.* Sec. III.B.4.

⁶¹¹ *National Universe Estimates -- Market Breaks*, Nielsen, Jan. 1, 2012. See also *infra.* Table 15.

⁶¹² 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901(a).

⁶¹³ *2010 Cable Price Survey Report*, 27 FCC Red at 2433, 2436, ¶¶ 13, 17.

⁶¹⁴ This plan only includes local channels; AT&T does not specify the number. See AT&T Inc., *Shop: Compare TV Packages*, <http://www.att.com/u-verse/explore/tv-landing.jsp> (visited Jan. 12, 2012).

⁶¹⁵ This plan includes 72 channels, excluding HD. In addition to the broadcast stations' primary signals, this package includes broadcast multicast signals and PEG, as well as WGN America and the Weather Channel. Additional national networks are available to households that bundle video services with broadband or voice service from Verizon. See Verizon Communications Inc., *FiOS TV, Local Channel Plan* (using 22201 zip code in Arlington, VA), <http://www.22.verizon.com/home/FiOSTV/Plans> (visited Jan. 12, 2012).

⁶¹⁶ DIRECTV, *English Packages* (using 22314 zip code in Alexandria, VA), http://www.directv.com/DTVAPP/new_customer_base_packages.jsp?footernavtype=-1&lpos=header (visited Jan. 12, 2012).

⁶¹⁷ DISH Network, *Entertainment: Channels, Washington, DC Hagerstown* (using 22314 zip code in Alexandria, VA), <http://www.dishnetwork.com/packages/local/default.aspx> (visited Jan. 12, 2012).

190. *Price to Advertisers.* Television broadcast stations get about 90 percent of their revenue through the sale of advertising time during their programs.⁶¹⁸ In the broadcasting industry, competition for advertising revenue occurs primarily within individual markets.⁶¹⁹ Generally, advertising rates are determined by a station's overall ability to attract viewers in its market area and a station's ability to attract viewers generally and among particular demographic groups that an advertiser may be targeting.⁶²⁰ Specifically, advertising rates depend upon: (1) the size of a station's market; (2) a station's overall ratings; (3) a program's popularity among targeted viewers; (4) the number of advertisers competing for available time; (5) the demographic makeup of the station's market; (6) the availability of alternative advertising media in the market; (7) the presence of effective sales forces; (8) the development of projects, features and programs that tie advertiser messages to programming; and (9) the level of spending commitment made by the advertiser.⁶²¹ Within network shows, stations are generally permitted to sell a fixed amount of advertising time, about 2.5 to three minutes per hour. Any remaining advertising time is sold by the network, which retains those revenues and includes the advertising in the network programming time. In the alternative, stations can use their allotted 2.5 to three minutes of time during network shows to promote their own programming. In newscasts or during other non-network shows, stations may sell approximately nine minutes of advertising time per hour.⁶²²

191. Local advertisers purchase time directly from a station's local sales staff. Such advertisers typically include car dealerships, retail stores, and restaurants.⁶²³ National advertisers that wish to reach a particular region or local audience buy advertising time through national advertising sales representative firms.⁶²⁴ Such advertisers typically include automobile manufacturers and dealer groups, telecommunications companies, fast food franchisers, and national retailers.⁶²⁵ Stations compete for advertising revenue with other stations in their respective markets; advertisers may also place advertisements with other media including newspapers, radio stations, magazines, outdoor advertising, transit advertising, yellow page directories, direct mail, local cable systems, DBS systems, and web sites online, as well as telephone and/or wireless companies.⁶²⁶

192. While individual stations do not make their advertising rates publicly available, prices for a composite group of television stations is available.⁶²⁷ Local advertisers typically use the cost per rating

⁶¹⁸ SNL Kagan, *Media Sector Forecast: Total TV Station Industry Revenue Projections Through 2015*, Jan. 25, 2012 (tables, Document ID 14075490); Robin Flynn, *The Complete Picture of TV Station Industry Revenues, 2006 to 2015*, SNL Kagan, Jan. 31, 2012, at 1-2. See also *infra*, Sec. III.B.4.b.

⁶¹⁹ Nexstar 2010 Form at 7; Gray 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 21.

⁶²⁰ Nexstar 2010 Form 10-K at 5; Gray 2010 Form 10-K at 4; Sinclair 2010 Form 10-K at 21.

⁶²¹ Nexstar 2010 Form 10-K at 5-6; Gray 2010 Form 10-K at 9; LIN 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 21.

⁶²² Vogel at 317, n. 29. In September 2010, ABC announced that it would launch its Inventory Exchange System, or IES, during the election season, making extra inventory available during periods of high demand, such as election and holiday season, for its affiliates, who have the option to buy additional advertising units to sell within their local markets. 2011 SNL Kagan TV Stations Databook at 6.

⁶²³ Nexstar 2010 Form 10-K at 6.

⁶²⁴ Nexstar 2010 Form 10-K at 5; Entravision 2010 Form 10-K at 11.

⁶²⁵ Nexstar 2010 Form 10-K at 6.

⁶²⁶ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 9; Belo 2010 Form 10-K at 5.

⁶²⁷ See TVB, *Trends: TV Cost & CPM Trends*, <http://www.tvb.org/trends/4718> (visited Jan. 16, 2012).

point ("CPP") measure to value advertising time, which represents the percentage of households in a local market with television sets watching a station or show at a given time.⁶²⁸ CPPs vary by the time of day, with prime time (8 p.m.-11 p.m., Eastern and Pacific Time; 7 p.m.-10 p.m., Central and Mountain Time), being the most expensive. For the top 100 television markets, on average, a station's CPP for a 30-second advertisement during prime time in 2006 was \$26,430. That is, on average, a station within the top 100 markets charged advertisers \$26,430 to reach one percent of the television households within its DMA with a 30-second commercial. The average prime time CPP for a station rose in 2007 to \$32,663, but had dropped to \$26,343 by 2010. During the late newscasts (11 p.m. Eastern and Pacific Time; 10 p.m., Central and Mountain Time), on average, stations charged lower prices. In 2006, on average, the CPP for a 30-second advertisement during this time slot was \$15,630. This average price dropped to \$14,934 by 2010.⁶²⁹ Advertisers assess the relative expense and efficiency of delivering a message via different media, e.g., a broadcast network compared with a group of broadcast television stations, on the basis of cost per thousand households ("CPM").⁶³⁰ We include CPM figures here in charts 14 and 14 b to provide another basis for comparing prices charged to advertisers since 2006.

Table 14: Top 100 Television Markets: Average Price of a 30-Second Commercial⁶³¹

Year	Prime Time		Late News	
	CPP	CPM	CPP	CPM
2006	\$26,430	\$28.08	\$15,630	\$16.61
2007	\$32,663	\$34.48	\$16,606	\$17.53
2008	\$26,484	\$27.67	\$15,122	\$15.80
2009	\$29,434	\$30.33	\$17,440	\$17.97
2010	\$26,343	\$26.76	\$14,934	\$15.17

193. *Price to MVPDs.* As discussed above, broadcast television stations are entitled to carriage on MVPDs' systems.⁶³² Commercial stations are entitled to decide whether to seek mandatory carriage or negotiate for compensation of their signals. As noted above, the Commission has opened a proceeding on issues related to retransmission consent.⁶³³ Broadcasters claim that the prices they charge MVPDs today are significantly lower than the fees paid to cable networks with comparable or lower ratings.⁶³⁴ In the

⁶²⁸ See The Museum of Broadcast Communications, *Cost-Per-Thousand (CPM) and Cost-Per-Point (CPP)*, <http://www.museum.tv/cotysection.php?entrycode=cost-per-thou> (visited Mar. 21, 2012); Vogel at 290-91, 574-75. For example, if 100,000 households in a DMA own television sets, and 20,000 of those households are tuned to a particular broadcast television station, then a station's rating is 20. If it charges \$25,000 per point during a particular program, then it can earn \$500,000.

⁶²⁹ Other non-advertising sources of revenue for broadcast television stations include retransmission consent fees, network compensation, DTV revenue, online revenue, and mobile revenue. These sources of revenue are discussed further, *infra*, Sec. III.B.4.b.

⁶³⁰ Vogel at 292.

⁶³¹ TVB, *Trends: TV Cost & CPM Trends*, <http://www.tvb.org/trends/4718> (visited Jan. 16, 2012) (citing SQUAD Media Market Guide 1st Quarter Projections (Fall books)).

⁶³² See *supra*, ¶¶ 56-60, for further discussion of retransmission consent.

⁶³³ See *Retransmission Consent NPRM*, *supra*, n. 154.

⁶³⁴ See, e.g., NAB 7/8/11 Reply, Attachment A at 43-44; Sinclair 10-71 Comments at 11-12 (citing Michael G. Baumann, *Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic* (continued....))

Retransmission Consent NPRM, the Commission sought comment on whether it should be a per se violation of the good faith standard for a station to grant another station (or station group) the right to negotiate its retransmission consent agreement(s) when the stations are not commonly owned ("Joint Negotiations").⁶³⁵ In previous proceedings, MVPDs have claimed that economic theory and evidence suggests that such joint negotiations lead to broadcast stations charging higher prices to MVPDs.⁶³⁶ NAB claims that Joint Negotiations help lower the transactions costs of negotiating retransmission consent agreements, and help level the playing field between broadcasters and MVPDs.⁶³⁷

b. Non-Price Rivalry

194. Broadcast stations compete with each other for viewers and advertisers on two major non-price criteria: (1) programming;⁶³⁸ and (2) the type of viewing experience.⁶³⁹ Each of these items is described below in turn.

195. *Programming.* The largest point of differentiation among broadcast stations is the type of programming they offer and when such programming is offered. Consumers watch multiple broadcast stations and switch stations based on the type of programming carried. When choosing the type of programming to air, stations weigh the cost of acquiring programming, the number of viewers they can expect to attract, the amount of advertising they can sell, and the prices they can charge to advertisers.

196. As noted above, the digital transition completed in 2009 introduced a dramatic increase in the use of multicasting among broadcast television station. Commercial stations use these multicast streams to offer consumers additional programming choices, such as new networks This TV (with 129 digital multicast affiliates), Bounce TV (with 52 digital multicast affiliates), and Retro TV (with 46 digital multicasting affiliates).⁶⁴⁰ In addition, multicasting enables stations in smaller markets to affiliate with multiple established networks. For example, The CW (with 108 digital multicast outlets) and My Network TV (87 outlets) are additional examples of established networks that enhance their coverage with multicasting.⁶⁴¹

197. Network affiliates typically market themselves based on their broadcast network affiliation and channel position (e.g., FOX 5) and their on-air news talent. Programming from broadcast networks can attract large audiences and provides network affiliates with popular entertainment

(Continued from previous page)

Analysis, Economists Inc., May 27, 2011, at 7, attached as Exhibit I to the Sinclair Comments); CBS Affiliates 10-71 Comments at 13-15.

⁶³⁵ See *Retransmission Consent NPRM*, 26 FCC Red at 2731-32, ¶ 23 (noting that consent for Joint Negotiations "might be reflected in local marketing agreements ("LMAs"), Joint Sales Agreements ("JSAs"), shared services agreements, or other similar agreements.").

⁶³⁶ See, e.g., Time Warner Cable Comments, MB Docket No. 09-182, at 7 (filed July 12, 2010) (citing an economist who believes that it is "very likely" that retransmission consent is jointly negotiated where stations are involved in some sort of sharing agreement); ACA Comments, MB Docket No. 09-182, at 2, 13-17 (filed July 12, 2010) (arguing that "available evidence . . . suggests" that higher rates are being paid by cable operators where one broadcast station negotiates retransmission consent on behalf of another station in the same market).

⁶³⁷ NAB 7/8/11 Reply, Attachment A at 27-32.

⁶³⁸ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8-9; Sinclair 2010 Form 10-K at 22.

⁶³⁹ Signal coverage and assigned frequency also impact a television station's competitive position. Gray 2010 Form 10-K at 21.

⁶⁴⁰ SNL Kagan, *TV Station Deals Databook*, 2012 Edition, at 6-7.

⁶⁴¹ *Id.*

programming and sporting events, such as the Olympics, National Football League games, Major League Baseball games, and the Academy Awards, that are extremely popular with both viewers and advertisers.⁶⁴² Networks also tend to schedule their most popular programming during the months of the year when Nielsen measures television audiences for all 210 markets (February, May, July, and November) to determine local advertising rates.⁶⁴³

198. Local news programming is another source of product differentiation for broadcast television stations, in their competition for both advertisers and viewers.⁶⁴⁴ This programming, which stations produce, is typically the largest source of their income, accounting for 35-40 percent of their advertising base.⁶⁴⁵ Some stations seek to increase their local advertising revenues in part by producing programming with local advertising appeal and sponsoring or co-promoting local events and activities.⁶⁴⁶ To attract audiences, stations also strive to provide exclusive news stories, unique features such as investigative reporting, coverage of community events and to secure broadcast rights to regional and local sporting events.⁶⁴⁷ Between 2006 and 2007, the average number of hours of news aired on weekdays by local television stations remained steady at 4.1 hours, increased to 4.6 hours in 2008, and 5.0 hours in

⁶⁴² Nexstar 2010 Form 10-K at 3; Sinclair 2010 Form 10-K at 11. The network affiliation agreements, generally exclusive for each of the 210 television markets, provide affiliates with the right to air network programming first. The contracts may run from two to 10 or more years. The Commission's right-to-reject rule grants an affiliate the right to (1) reject or refuse network programs which the station reasonably believes to be unsatisfactory, unsuitable, or contrary to the public interest and (2) substitute a program which, in the station's opinion, is of greater local or national importance. 47 C.F.R. § 73.658(e). The financial arrangements between networks and their affiliated stations regarding payments for programming are evolving. See *infra*, Sec. III.B.4.b.

⁶⁴³ While networks and stations consider May to be the most important measuring period of the year, they also compete intensely in February and November, when audiences are likely to stay at home. Vogel at 291. See also Nielsen Media Research, *Glossary of Media Terms*, <http://www.nielsenmedia.com/glossary/> (visited Mar. 22, 2012). Nielsen refers to these months as "sweep months." Nielsen excludes the Honolulu, Fairbanks, and Juneau DMAs from its July measurement period.

⁶⁴⁴ Gray 2010 Form 10-K at 7; LIN 2010 Form 10-K at 7-8; Sinclair 2010 Form 10-K at 9.

⁶⁴⁵ Vogel at 304. See also Robert Papper, *Part I: More Jobs, Higher Profits in TV News*, Hofstra University, 2011, http://www.rtdna.org/pages/media_items/2011-tv-and-radio-news-staffing-and-profitability-survey2033.php?id=2033 ("RTNDA/Hofstra 2011 Survey") (visited Mar. 22, 2012).

⁶⁴⁶ See, e.g., Nexstar 2010 Form at 6; LIN 2010 Form 10-K at 8. Nexstar states that each of the stations it owns, operates, programs, or provides sales and other services to create a highly recognizable brand, primarily through the quality of news programming and community presence. Nexstar asserts that strong local news typically generates higher ratings among attractive demographic groups and enhances audience loyalty, potentially resulting in higher ratings for programs preceding and following the newscasts. Nexstar claim that high ratings and strong community identities also makes stations attractive to advertisers. In 2010, Nexstar earned approximately one third of its advertising revenues from spots aired during local news programming. Nexstar's stations produce between 10 to 15 hours per week of local news programming. Nexstar 2010 Form 10-K at 3.

⁶⁴⁷ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8-9.

2009.⁶⁴⁸ In 2010, the average television station aired 5.3 hours of weekday news.⁶⁴⁹ NAB contends that operating agreements among non-commonly owned broadcasters enable stations to maintain and sometimes expand news on stations, despite a difficult economic climate.⁶⁵⁰

199. Stations also air syndicated programming, such as original series *Judge Judy*, off-network programs such as *Friends*, or sporting events such as the NCAA basketball and football games from the Southeastern Conference.⁶⁵¹ Competition for programming involves negotiating with national program distributors or syndicators that sell first-run and rerun packages of programming in their respective markets.⁶⁵² Stations compete against in-market broadcast stations for exclusive access to syndicated programming within their markets. In addition, cable networks occasionally acquire programs that might otherwise be offered to stations.⁶⁵³ Syndicated programming can be expensive for stations, and may represent long-term financial commitments.⁶⁵⁴ Stations usually purchase syndicated programming two to three years in advance, and sometimes must make multi-year commitments.⁶⁵⁵ An average broadcast station spends about 24.3 percent of its expenses on acquiring syndicated programming.⁶⁵⁶ Expenses may range, however, from about eight percent of revenues for a Spanish-language station, which tends to rely on network programming for a majority of its schedule to nearly two-thirds of revenues for an

⁶⁴⁸ Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities*, FCC, July 2011, at 77, http://transition.fcc.gov/osp/nc-report/The_Information_Needs_of_Communities.pdf. The data are based on the *RTNDA/Hofstra University Annual Survey*, conducted by Robert Papper for the Radio Television Digital News Association and Hofstra University. See RTNDA/Hofstra 2011 Survey. Note that surveys from 2007-2009 are unavailable on the website as of March 2012.

⁶⁴⁹ RTNDA/Hofstra 2011 Survey, *Part II: Record Amount of Local News Produced on TV*. Note that while RTNDA/Hofstra released survey results in 2011, Professor Robert Papper conducted the survey during the fourth quarter of 2010.

⁶⁵⁰ NAB 6/8/11 Comments at 29-31. Such arrangements include joint sales agreements, shared services agreements, and local marketing agreements. Our attribution rules currently make attributable certain LMAs, also referred to as time brokerage agreements ("TBAs"), in which a broker purchases discrete blocks of time from a licensee and supplies programming and sells advertising for the purchased time. According to commenters, a local news service ("LNS") agreement is as an agreement in which multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor. According to commenters in the ownership proceeding, a shared service agreement ("SSA") is an agreement, or series of agreements, in which one in-market station provides operational support and programming for another in-market station. We are currently seeking comment on LNS agreements and SSAs in the Media Ownership proceeding. See *Media Ownership NPRM*, 26 FCC Rcd at 17564-70, ¶¶ 195-208.

⁶⁵¹ ESPN Inc., *WDCW-TV DC50 Named SEC Network Affiliate in Washington DC - DC50 to Air Men's SEC Basketball and Football Through ESPN Regional Television's Syndicated Network* (press release), Jan. 4, 2012. ESPN, a cable network, has a division called ESPN Regional Television that produces and syndicates collegiate sporting events. See also Sinclair 2010 Form 10-K at 11.

⁶⁵² Nexstar 2010 Form 10-K at 7.

⁶⁵³ *Id.*; Gray 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 22.

⁶⁵⁴ Syndicated programming can impose financial risks on stations. Broadcast stations cannot predict whether a particular show will be sufficiently popular to enable it to sell enough related advertising time to cover the costs of the program. A station may have to replace a poorly performing program before it has recovered the costs of obtaining it. Sinclair 2010 Form 10-K at 25; Gray 2010 Form 10-K at 20; Belo 2010 Form 10-K at 11. In 2010, Gray wrote down the value of its programming contract assets by \$0.4 million. Gray 2010 Form 10-K at 20.

⁶⁵⁵ Gray 2010 Form 10-K at 20; Belo 2010 Form 10-K at 11.

⁶⁵⁶ NAB, *Television Financial Report*, 2011, at 3 ("2011 NAB Television Financial Report").

independent station, which relies primarily on syndicated programming.⁶⁵⁷ For example, syndication rights for the series *The Big Bang Theory* and *Modern Family* cost stations about \$2.5 million per episode in barter and cash.⁶⁵⁸

200. Despite its price tag, a popular program may be a profitable investment for a station, if it provides a lead-in audience for a station's local newscasts, differentiating it from competing stations, and increasing audience and revenues. Other factors may help to reduce the costs of syndicated programming for stations. For example, large group owners can use economies of scale to negotiate favorable contractual terms with program suppliers.⁶⁵⁹

201. *Viewing Experience.* Since the last report, several major patterns of consumer behavior have emerged which impact broadcast stations' non-price rivalry. The first is the dramatic increase in the number of television households with sets capable of displaying and/or receiving digital signals, including HD television signals. The number of households equipped with an HD television set and HD tuner who received at least one HD network or station increased from 15.4 million, or 13.6 percent of all television households, in 2007, to 68.8 million, or 59.4 percent in 2010, and again in 2011 to 80.3 million, or 70 percent of all television households.⁶⁶⁰ The second is the doubling of penetration of digital video recorders (DVRs), which rose from 20.4 million or 18.6 percent of television households in 2007, to 42.5 million, or 36.8 percent in 2010, and 46.3 million, or 40.4 percent of television households in 2011.⁶⁶¹ The availability of DVRs coupled with other technological developments has spurred consumers' desire to watch video on a time-shifted basis on television sets, personal computers, and mobile devices. As digital video recorders have gained popularity, Nielsen began reporting "live-plus-same-day playback," or "LSD" viewing as the currency for buying and selling local television time, where such ratings are available.⁶⁶² In August 2010, it found that while the total effect of DVR playback on ratings was small, the audience composition changed.⁶⁶³

⁶⁵⁷ FCC staff analysis of data. See NAB, *Television Financial Report, 2009* ("2009 NAB Television Financial Report").

⁶⁵⁸ Deana Myers, *What is a Sitcom's Chance of Success*, SNL Kagan, Feb. 9, 2012.

⁶⁵⁹ Nexstar 2010 Form 10-K at 3.

⁶⁶⁰ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media U/E Trends*, Nielsen, Feb. 2011; Nielsen, *TELEVISION AUDIENCE 2010 & 2011*, 2011, at 4 ("Nielsen 2010 & 2011 Television Audience Report"). MVPD households with HD television sets wishing to receive HD service must have HD service included in their subscriptions.

⁶⁶¹ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media U/E Trends*, Nielsen, Feb. 2011; Nielsen 2010 & 2011 Television Audience Report at 4.

⁶⁶² Katy Bachman, *Nielsen Returns 'Live' to the Ratings*, ADWEEK, July 1, 2010, <http://www.adweek.com/news/advertising-branding/nielsen-returns-live-ratings-102743> (visited July 10, 2012). See also The Nielsen Company, *Measurement, Television Measurement, 2011-12 Sweeps Dates*, <http://www.nielsen.com/us/en/measurement/television-measurement.html> (visited July 10, 2012).

⁶⁶³ Katy Bachman, *Nielsen Releases Analysis of LSD Data*, ADWEEK, Aug. 5, 2010, <http://www.adweek.com/news/advertising-branding/nielsen-releases-analysis-lsd-data-115873> (visited July 10, 2012). LSD viewers tended to be younger and higher-income than live viewers generally. As described in Section III.B.4, *infra*, advertisers buy time on broadcast and cable networks on the basis of viewership of commercials.

Table 15: Television Households and Media Usage Estimates (in thousands)⁶⁶⁴

	2006	2007	2008	2009	2010	2011
Total U.S. Households	113,673	114,890	115,760	116,170	117,220	118,590
U.S. TV HHs	111,400	112,800	114,500	114,900	115,900	114,700
Broadcast Only	15,660	14,340	13,600	11,830	11,080	10,970
MVPD	95,740	98,460	100,900	103,070	104,820	103,730
DVR Owner ⁶⁶⁵	N/A	20,970	27,950	36,160	42,540	46,320
HD TV Households ⁶⁶⁶	N/A	15,350	29,010	49,640	68,810	80,290

202. In response to these consumer trends, stations have taken a number of steps to enhance consumers' viewing experience. First, stations are increasingly distributing their programming in HD. At the end of 2010, about 1,036, or almost 87 percent of the 1,196 commercial television stations surveyed by SNL Kagan, broadcast in HD, up from 957 commercial television stations as of August 31, 2009 (or about 79 percent of the 1,010 commercial stations surveyed by SNL Kagan).⁶⁶⁷ Stations have also invested in building new sets and on-air graphics in order to accommodate their HD broadcasts. The deployment of newscasts in HD, at least from station studios, slowed in 2008 and 2009 as broadcast stations tried to hold costs down, but began to accelerate in 2010.⁶⁶⁸ According to a survey conducted by consulting firm Positive Flux, as of 2010, about 63 percent of large market stations (which the firm categorizes as stations in DMAs 1-79) had begun broadcasting fully in HD. On the other hand, 90 percent of stations in small markets (i.e., stations in DMAs 140-210) were not broadcasting fully in HD at that time.⁶⁶⁹

⁶⁶⁴ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media U/E Trends*, Nielsen, Feb. 2011; Nielsen 2010 & 2011 Television Audience Report at 4. Nielsen estimates are as of January 1. We use Nielsen's January 1 estimates for December 31 of the previous year (e.g., we report Nielsen's January 1, 2007 estimate as our 2006 data in this chart).

⁶⁶⁵ Nielsen began tracking DVR penetration in May 2007.

⁶⁶⁶ Nielsen began tracking HD penetration in February 2008. HD data as of February and reported here for the previous year, except for 2011 when the data are based on November 2011 estimates. We report the number of households with an HD television with an HD tuner that receives at least one HD network or station.

⁶⁶⁷ 2011 SNL Kagan TV Stations Databook at 10; Justin Nielson, *TV Stations Multiplatform Analysis: Digital Conversion Creates Opportunities for Multicasting*, SNL Kagan, Jan. 22, 2010. The 1,196 commercial stations surveyed by SNL Kagan in 2010 represents 86 percent of the 1,390 commercial stations counted by the Commission at the end of 2010. The 1,010 commercial stations surveyed by SNL represent 72 percent of the 1,394 commercial stations counted by the Commission at the end of the third quarter of 2009. See 2011 SNL Kagan TV Stations Databook at 7.

⁶⁶⁸ Harry A. Jessell, *Tracking TV's Top Tech Trends of 2010*, TVNEWSCHECK, Dec. 23, 2010, <http://www.tvnewscheck.com/article/2010/12/23/47961/tracking-tvs-top-tech-trends-of-2010?ref=search> (visited Jan. 13, 2012).

⁶⁶⁹ Positive Flux, *Executive Summary*, U.S. TV Stations Infrastructure 2011, April 4, 2011, at 4, <http://positiveflux.com/store#Stations%20Full> (visited Feb. 27, 2012).

203. To respond to viewers' desire to view video programming in more places at more times, broadcast station owners have developed online and mobile media platforms, using their websites as extensions of their local brands, and offered advertisers online promotions coordinated with the on-air advertisements. SNL Kagan estimates that at the end of 2010, 95.4 percent of full-power commercial television stations operated a website and about 88.6 percent streamed video content.⁶⁷⁰ Local news and weather updates were provided by 78.8 percent of broadcast television station websites and 64.5 percent provided local classified advertisements.⁶⁷¹ About 74.1 percent of websites contained links to articles via Facebook, and 68 percent had links via Twitter.⁶⁷² Nearly 40 percent of station websites had mobile app downloads for smartphones.⁶⁷³ A study by the Radio Television Digital News Association ("RTNDA") and Hofstra University found that two-thirds of television stations surveyed distributed news programming online and via mobile devices, as well as over-the-air *i.e.*, they are taking a "three-screen approach."⁶⁷⁴ The larger the news department, the more likely the station was to use the three-screen approach. While most stations with a three-screen approach were broadcast network affiliates, the size of their markets did not appear to impact their decision to utilize this approach.⁶⁷⁵

204. NAB states that the roll-out of mobile DTV will enable viewers to receive live, local broadcast television programming on a mobile basis, on any mobile DTV capable device.⁶⁷⁶ In 2007, eight major broadcast station groups, including Belo Corp.; FOX Television Stations; Gannett Broadcasting; Gray Television; ION Media Networks; NBC & Telemundo Television Stations; Sinclair Broadcast Group; and Tribune Broadcasting Company formed the Open Mobile Video Coalition ("OMVC") to promote the development of industry technical standards, technical requirements, conditions, protocols, reference implementations, test suites, and best practices related to enabling mobile digital television.⁶⁷⁷ The first rollout of live mobile broadcast channels began in 2010.⁶⁷⁸ OMVC worked with the Advanced Television Systems Committee (ATSC) to develop a comprehensive standard and to develop field trials. The first ATSC – Mobile/Handheld (ATSC-M/H), or mobile DTV stations, went live in three OMVC consumer test markets, Washington, D.C., Seattle, and Atlanta.⁶⁷⁹ Participants

⁶⁷⁰ 2011 SNL Kagan TV Stations Databook at 10.

⁶⁷¹ *Id.*

⁶⁷² *Id.* at 11.

⁶⁷³ *Id.*

⁶⁷⁴ RTNDA/Hofstra 2011 Survey, *Part III: Stations Sharing Content, Resources* at 4-5. This study also found that that between 2009 and 2010 stations shifted from primarily using social media as a promotional tool to using it as a tool for conversations with their audiences. Belo notes that the websites of its television stations provide consumers with news and information as well as a variety of other products and services. Belo obtains immediate feedback through online communication with its audience, which allows the Belo to tailor the way in which it delivers news and information to serve the needs of its audience. Belo 2010 Form 10-K at 4.

⁶⁷⁵ RTNDA/Hofstra 2011 Survey, *Part III: Stations Sharing Content, Resources* at 4-5.

⁶⁷⁶ NAB 6/8/11 Comments at 22.

⁶⁷⁷ Open Mobile Video Coalition ("OMVC"), *Open Mobile Video Coalition to Promote Mobile Digital Broadcast TV in U.S.* (press release), Apr. 13, 2007.

⁶⁷⁸ OMVC, *Open Mobile Video Coalition Launching Comprehensive Mobile Digital Television Consumer Showcase During First Quarter of 2010* (press release), Jan. 5, 2010. OMVC opened its membership to equipment manufacturers, application developers, and service providers in 2011. OMVC Comments, ET Docket No. 10-235, at 1 (filed Mar. 18, 2011).

⁶⁷⁹ 2011 SNL Kagan TV Stations Databook at 6.

announced successful trial results in September 2010. Television station groups have formed coalitions to develop applications. At the end of 2010, 60 operating commercial mobile DTV stations broadcast more than 80 live mobile video channels in major markets.⁶⁸⁰ This number increased to 105 live mobile DTV stations at the end of 2011.⁶⁸¹

205. In April 2010, twelve major broadcast groups created a joint venture, Mobile Content Venture ("MCV"), to develop a national mobile content service.⁶⁸² MCV is working with original equipment and device manufacturers to develop devices capable of receiving ATSC-MH, encrypted with standards-based conditional access.⁶⁸³ Under the brand name Dyle Mobile TV, MCV plans to deliver live mobile television from twelve major broadcast television group owners in 2012.⁶⁸⁴ In January 2012, MCV and MetroPCS Communications, Inc. announced that they are partnering to enable MetroPCS customers to watch live, local broadcast television on their mobile phones, making MetroPCS the first wireless service provider to offer Dyle Mobile TV on devices pre-loaded with the Dyle application.⁶⁸⁵ Likewise, the Mobile500 Alliance is a group of 50 member companies, including two public broadcasters, holding licenses to 437 television stations, reaching 94 percent of U.S. households, incorporated in December 2010 to develop Mobile DTV.⁶⁸⁶ The Mobile500 Alliance plan calls for launching 15-20 Mobile DTV channels in markets across the country. The proposed service will provide mobile device users with a mix of free and subscription channels along with video-on-demand content and data services delivered via mobile DTV and through 3G/4G and Wi-Fi networks.⁶⁸⁷

4. Broadcast Television Industry Performance

206. In this section of the Report, we examine broadcast stations' performance in terms of their audiences, revenue, and profitability as well as their investment and innovation. We also review the interplay between the trends in broadcasters' sources of revenues and expenses, their strategies for distributing video programming, and other factors influencing broadcasters' performance. The majority

⁶⁸⁰ Justin Nielson, *TV Stations Multiplatform Analysis '11 Update: Multicasting Expands Programming Options, Mobile DTV Goes Live*, SNL Kagan, Jan. 28, 2011, at 8. As of 2012, OMVC's members own and operate more than 900 commercial and noncommercial television stations nationwide, reaching 103 million households in 96 of the top 100 DMAs. OMVC, *About OMVC: Overview*, <http://www.openmobilevideo.com/about%2Domvc/> (visited Jan. 19, 2012).

⁶⁸¹ Justin Nielson, *TV Stations Multiplatform Analysis '12 Update: New Digital Networks and Mobile TV Channels Expand Content Options*, SNL Kagan, Jan. 31, 2012, at 10.

⁶⁸² The twelve founding broadcast groups of Mobil Content Venture ("MVC") are O&O groups FOX, NBC (including the Telemundo stations), and ION and nine affiliate groups – Belo Corp., Cox Media Group, E.W. Scripps, Gannett Broadcasting, Hearst, Media General, Meredith Corp., Post-Newsweek Stations, Inc., and Raycom Media – that separately formed Pearl Mobile DTV Company L.L.C. as a vehicle for their involvement in MVC. MVC, *Twelve Major Broadcast Groups to Form Joint Venture to Develop National Mobile Content Service* (press release), Apr. 13, 2010.

⁶⁸³ MVC, *About MVC*, <http://www.themcv.com/about-mcv> (visited Jan. 13, 2012).

⁶⁸⁴ These group owners include the original twelve founders described above, as well as Bahakel and Univision. See Samsung Electronics Co., *Samsung Mobile to Supply First Live Mobile TV-Enabled Smartphone with Dyle™ Mobile TV* (press release), Jan. 4, 2012.

⁶⁸⁵ Samsung Telecommunications America (Samsung Mobile) will provide the first smartphone with Dyle, and Android device, using ATSC-Mobile technology. *Id.*

⁶⁸⁶ The Mobile 500 Alliance, *About*, <http://www.mobile500alliance.com/aboutus.html> (visited Jan. 13, 2012).

⁶⁸⁷ *Id.*

of broadcast television station licensees are part of parent companies that are involved in other industries. To provide context, in the evaluation of the performance of the broadcast television station industry as a whole, we examine a select group of companies that are only involved in this industry, *i.e.*, “pure play” broadcast television station group owners. As publicly traded pure-play companies, they provide detailed information about their performance in the broadcast industry. Throughout this section, we examine the performances of the five companies used by research firm SNL Kagan in its tracking index for the broadcast television station industry as of December 31, 2010: Belo Corporation, Gray Television Inc., LIN TV Corporation, Nexstar Broadcasting Group, and Sinclair Broadcasting Group.⁶⁸⁸

207. Because of its dependence on advertising revenues, which are highly correlated with overall economic conditions, broadcasting is a highly cyclical industry.⁶⁸⁹ This is in part because marketers often view advertising as a discretionary expense and cut back when the economy declines.⁶⁹⁰ In addition, some categories of advertisers, especially the automobile sector, are responsible for a large proportion of stations’ advertising revenues. Automobile dealers can account for 25 percent of a typical television station’s revenues in good times.⁶⁹¹ In 2009, the automobile sectors’ share of station groups’ overall advertising fell to teen levels in the first quarter.⁶⁹² Station revenues tend to be higher in even years, due to political advertising, which tends to peak immediately before elections.⁶⁹³ In addition, NBC affiliates can charge higher rates during the Olympic Games, which air in even years.⁶⁹⁴

208. Moreover, broadcast television stations face changing technology. Industry participants note that information delivery and programming alternatives such as MVPDs, the Internet, mobile devices, DVRs, and home video entertainment systems have fractionalized television viewing and audiences, expanded the number of outlets for advertisers, and increased competition for the acquisition of programming.⁶⁹⁵ Belo adds that these trends, combined with rising production and programming costs, may impair broadcast stations’ ability to acquire and develop programming.⁶⁹⁶ Industry participants also

⁶⁸⁸ While Sinclair has invested in non-broadcast businesses in order to diversify its risks, these only represent a small portion of its overall operating results. Sinclair 2010 Form 10-K at 11. We exclude Belo in our analysis of profits and investment trends between 2006 and 2010, since Belo operated newspapers as well as television stations until February 2008, when it spun off its newspaper businesses and related assets into a separately traded company, A. H. Belo Corporation. Belo 2010 Form 10-K at 5.

⁶⁸⁹ Vogel at 301-03. “We [are dependent] on advertising revenues, which are seasonal and cyclical” Gray 2010 Form 10-K at 15. *See also* Nexstar 2010 Form 10-K at 12; LIN 2010 Form 10-K at 21; Sinclair 2010 Form 10-K at 23.

⁶⁹⁰ “Advertisers generally reduce their spending during economic downturns” Belo 2010 Form 10-K at 10. *See also* Nexstar 2010 Form 10-K at 18.

⁶⁹¹ Vogel at 309.

⁶⁹² Robin Flynn, *Broadcasters’ Auto Revenues Down 52% in First-Quarter 2009*, SNL Kagan, May 14, 2009. Gray TV states that in 2010 and 2009, approximately 17 percent of its total revenues came from the automotive category. Gray 2010 Form 10-K at 4. Belo, which in 2010 generated 19.8 percent of all of its advertising from the automotive industry, notes that the success of automotive manufacturers and dealers in meeting the economic challenges of the automotive industry will continue to affect the amount of their advertising spending, which in turn will impact Belo’s revenues and operations. Belo 2010 Form 10-K at 10. *See also* LIN 2010 Form 10-K at 21.

⁶⁹³ Nexstar 2010 Form 10-K at 6; Gray 2010 Form 10-K at 8.

⁶⁹⁴ Belo 2010 Form 10-K at 10.

⁶⁹⁵ Belo 2010 Form 10-K at 9; Nexstar 2010 Form 10-K at 19; Gray 2010 Form 10-K at 21; Sinclair 2010 Form 10-K at 30-31; LIN 2010 Form 10-K at 26.

⁶⁹⁶ Belo 2010 Form 10-K at 9.

note that video compression techniques enable MVPDs' and competing television stations to carry more programming (e.g., via multicasting), potentially fractionalizing audiences and advertisers even further.⁶⁹⁷

209. In the short run, most of a station's operating costs are fixed.⁶⁹⁸ Regardless of the amount of advertising inventory it sells, a station must pay for the cost of operating its facilities as well as the costs of programming rights. Therefore, when economic conditions are favorable and a station is able to charge high prices for its commercial inventory, it can be profitable. Conversely, because stations remain dependent on advertising revenues, when they decline, aside from laying off employees and reducing sales commissions, stations usually are unable to reduce expenses, and thus profits can decline sharply. Other sources of stations' revenues include retransmission consent fees, ancillary DTV services, and online advertising.⁶⁹⁹

a. Audiences

210. The industry relies on Nielsen data to measure broadcast television station audiences. Nielsen measures television ratings as a percentage of households with television sets who view a program.⁷⁰⁰ Nielsen estimates that between 2006 and 2010, the total number of U.S. households grew from 113.7 million to 117.2 million. As of 2011, Nielsen estimates that there were 118.6 million total households. Nielsen estimates that the percentage of households with television sets remained steady at 98 percent for thirty years between 1980 and 2010, but then increased to 99 percent in 2010 or about 115.9 million total television households.⁷⁰¹ For 2011, however, Nielsen adjusted its estimates of television penetration downward to 97 percent, or about 114.7 million households.⁷⁰² Nielsen believes the factors that may have contributed to this downward trend include the digital transition, the economic downturn leading rural and lower-income households to conclude that the price of acquiring television sets is too high, and younger, urban consumers who may substitute online viewing for traditional television viewing.⁷⁰³

211. After a steady decline over the last few years, the percentage of television households relying exclusively on over-the-air broadcast service (as opposed to access to broadcast stations via an MVPD) has remained stable since 2010, although the absolute number continued to decline as the number of television households declined. At the end of 2006, about 14.1 percent of all U.S. television households, or 15.66 million households, were broadcast only.⁷⁰⁴ This figure declined to 12.7 percent of all U.S. television households, or 14.34 million households, at the end of 2007. This figure dropped further to 11.9 percent (13.60 million households) at the end of 2008, 10.3 percent (11.83 million

⁶⁹⁷ Nexstar 2010 Form 10-K at 19; Sinclair 2010 Form 10-K at 31.

⁶⁹⁸ Vogel at 304.

⁶⁹⁹ See *infra*, Sec. III.B.4.b.

⁷⁰⁰ Nielsen, *News & Insights: Top Tens & Trends, Television*, <http://www.nielsen.com/us/en/insights/top10s/television.html> (visited Mar. 23, 2012).

⁷⁰¹ Nielsen 2010 & 2011 Television Audience Report at 4-5.

⁷⁰² Nielsen, *Advance Preliminary 2012 National Universe Estimates* (client communication), May 2, 2011. Nielsen data suggest that television penetration had actually begun to decline in late 2008 or early 2009, but waited for additional information to confirm whether this trend was temporary due to the digital television transition.

⁷⁰³ Other studies indicate that college students are watching video content on computers and laptops in lieu of television sets. See *College-Age TV Watchers Have No Cords to Cut*, eMarketer, Dec. 15, 2011, <http://www.emarketer.com/Article.aspx?id=1008735&R=1008735> (visited Mar. 5, 2012).

⁷⁰⁴ See *supra*, Table 15.

households) at the end of 2009 and again at the end of 2010 to 9.6 percent (11.08 million households), remaining steady at 9.6 percent (10.97 million households) at the end of 2011.⁷⁰⁵

212. While viewing shares of broadcast network affiliates declined between the 2005-2006 and 2010-2011 television seasons, viewing shares of independent and non-commercial broadcast television stations, whose shares are relatively low, fluctuated, but generally held steady. In contrast, the combined viewing shares of advertising-supported cable networks increased during this period. As shown in Table 16, the total day share of viewing for broadcast network affiliates declined from 36 percent in the 2005-2006 television season to 28 percent in the 2010-2011 television season.⁷⁰⁶ During prime time,⁷⁰⁷ their share fell from 40 percent to 33 percent between the 2005-2006 and 2010-2011 television seasons. Independent stations' total share was three percent in both the 2005-2006 season and 2010-2011 seasons. During prime time, their share was two percent in the 2005-2006 season and 2010-2011 seasons. Noncommercial stations' total and prime time shares were two percent in the 2005-2006 and 2010-2011 seasons.⁷⁰⁸

⁷⁰⁵ Nielsen, *National Universe Estimates*, Jan. 1, 2008-Jan. 1, 2012. For the purposes of this Report, we use Nielsen's January 1 estimates for our December 31 estimates of the prior year. For 2006, we use Nielsen's estimates from its 2007 Television Audience Report. See Nielsen, *Television Audience 2007* (2008), at 3.

⁷⁰⁶ Nielsen 2010 & 2011 Television Audience Report at 18. Total day viewing includes viewing Monday-Sunday, 6 a.m.-6 a.m. A share is the percentage of television households watching television who are watching a particular programming source. Due to simultaneous multiple-set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized the audience shares by recalculating them on a base (or denominator) equaling 100 percent and adjusting the numerators accordingly.

⁷⁰⁷ Monday-Saturday, 8-11 p.m. Eastern and Pacific Time (7-10 p.m. Central and Mountain Time); Sunday 7-11 p.m. Eastern and Pacific Time (6-10 p.m. Central and Mountain Time).

⁷⁰⁸ Since the last report, Nielsen has altered its methodology of measuring television viewing to include viewing on a time-shifted basis. For the 2009-2010 television season, Nielsen began releasing "C3" ratings data for television viewing, which measures the commercials watched both live and for three days via DVR playback. This is the metric under which much of broadcast and cable network advertising is bought and sold. See Nielsen, "C3" TV Ratings Show Impact of DVR Ad Viewing, Oct. 14, 2009, http://blog.nielsen.com/nielsenwire/media_entertainment/c3-tv-ratings-show-impact-of-dvr-ad-viewing/ (visited Mar. 23, 2012). To include VOD, and online viewing in their ratings, networks must include the same set of commercials that appear in the initial live telecast. This measurement does not apply to local ratings.

Table 16: Audience Shares

Total Day	2005- 2006	2006- 2007	2007- 2008	2008- 2009	2009- 2010	2010- 2011
Viewing Source:						
Network Affiliates	36	34	32	30	29	28
Independents	3	2	2	2	2	3
Non-Commercial Networks	2	2	2	1	2	2
Ad Supported Cable	50	49	50	52	52	53
Premium Pay Networks	4	4	4	4	4	4
All Other Cable Networks	5	5	5	5	5	5
All Other Tuning ⁷⁰⁹	1	4	6	6	6	5
Total Day Total:	100	100	100	100	100	100

Prime Time	2005- 2006	2006- 2007	2007- 2008	2008- 2009	2009- 2010	2010- 2011
Viewing Source:						
Network Affiliates	40	39	37	35	34	33
Independents	2	2	2	2	2	2
Non-Commercial Networks	2	2	2	2	2	2
Ad Supported Cable	46	47	48	49	50	51
Premium Pay Networks	4	3	3	4	3	4
All Other Cable Networks	5	4	4	4	4	4
All Other Tuning	1	3	5	5	5	4
Prime Time Total:	100	100	100	100	100	100

213. In addition, stations are attracting audiences on their digital multicast signals. For example, WVUE in New Orleans, after launching Bounce TV on a digital multicast channel in November 2011, earned higher ratings than several basic cable networks and is competing strongly with several broadcast outlets.⁷¹⁰ Stations also are attracting consumers to their websites. In this regard, one report citing a Fall 2010 survey indicates that out of 80 markets measured, television websites attracted more

⁷⁰⁹ "All other tuning" refers to tuning where the source was not encoded and Nielsen was not able to measure what was watched. Bill Gorman, *Where Did the Primetime Broadcast TV Audiences Go?*, TV by the Numbers, April 12, 2010, <http://tvbythenumbers.zap2it.com/2010/04/12/where-did-the-primetime-broadcast-tv-audience-go/47976/> (visited July 10, 2012).

⁷¹⁰ *Bounce TV Powers Ratings on WTUE*, TVNEWSCHECK, Jan. 13, 2012, <http://www.tvnewscheck.com/article/2012/01/13/56717/bounce-tv-powers-ratings-on-wvue> (visited Jan. 13, 2012). In December 2011, WVUE reported that its Bounce TV signal earned a 0.4 total day local market rating, tying CNN's Headline News (0.4) and outranking cable networks TV One (0.2), Oxygen (0.2), BBC America (0.2) and CNBC (0.1).

visitors than newspaper websites in 22 markets (or 27 percent), while the major daily newspapers' websites led in the amount of traffic attracted in the remaining markets.⁷¹¹

b. Revenue

214. This section of the Report describes broadcast television stations revenue from advertising during the relevant period. It then considers other sources of broadcast television station revenue during the period, including network compensation, retransmission consent fees, revenues from non-broadcast ancillary services, online revenues, and other revenues.

215. Overall, broadcast television station revenues began dropping after 2000, when they reached a high of \$26.30 billion.⁷¹² By contrast, in 2006, broadcast stations earned \$24.62 billion in revenues. In 2007, industry revenues declined by seven percent to \$22.84 billion; in 2008, they declined by one percent to \$22.60 billion. In 2009, industry revenues dropped by 20 percent, to \$18.13 billion. In 2010, industry revenues showed some recovery and, rose by 23 percent to \$22.22 billion. Thus, while the broadcast television station industry lost about \$4.5 billion between 2008 and 2009, it regained about \$4.1 billion between 2009 and 2010.

Table 17: Broadcast Television Station Industry Revenue Trends (in millions)⁷¹³

Revenue Sources	2006	2007	2008	2009	2010
Advertising	\$23,574.7	\$21,575.5	\$21,062.1	\$16,337.2	\$19,943.7
Network Compensation	\$246.7	\$170.0	\$133.6	\$81.6	\$48.2
Retransmission Consent	\$214.6	\$313.5	\$500.1	\$757.8	\$931.8
Online	\$586.9	\$775.9	\$903.6	\$948.8	\$1,086.6
Total	\$24,623	\$22,835	\$22,599	\$18,125	\$22,010
Percentage Change		7%	1%	20%	21%

216. *Advertising Revenue.* On-air advertising is by far the most significant source of revenue for television stations, although its share of overall broadcast television station industry revenues is declining. It represented about 96 percent of broadcast television station industry net revenues in 2006 and 91 percent of industry revenues in 2010.⁷¹⁴ Advertising sold by broadcast television stations falls into two categories: local spot and national spot.

⁷¹¹ Borrell Associates Inc., *Benchmarking TV's Local Online Sales*, February 2011, at 19, http://www.tvb.org/media/file/Borrell_2010_TV_Internet_Growth_Feb2011.pdf ("Borrell Study"). Citing data from the Media Audit, Borrell measured the number of visitors who logged onto a major newspaper website during a month within the Fall of 2010 and compared it with the number of visitors who had logged onto individual television stations' sites.

⁷¹² Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. As noted above, revenues tend to be higher in even years.

⁷¹³ *Id.*

⁷¹⁴ Net revenues equal all advertising, online revenues, and network compensation received by stations, plus retransmission consent revenues received from MVPDs, minus retransmission consent revenues network affiliates pay networks.

217. Local advertisers purchase local spot advertising to reach viewers within a station's market. They may work with local advertising agencies or directly with a station's sales staff.⁷¹⁵ Local advertising is more sensitive to the economic climate of a station's geographic market. For example, even if a station is attracting large audiences, if the local economy is suffering, local businesses may choose not to advertise or to limit their advertising.⁷¹⁶ Based on our analysis of SNL Kagan data, local advertising represented about 53.3 percent or \$12.2 billion of broadcast television station industry revenues in 2007, and 50.7 percent or \$11.3 billion of industry revenues in 2010.⁷¹⁷ NAB estimates that, in 2007, on average, about 61.6 percent of a station's gross advertising revenues were from local advertising,⁷¹⁸ compared with 56.1 percent in 2010.⁷¹⁹ The percentages may vary depending on the station and the DMA a station serves. Local advertisers may choose to advertise using local broadcast television or radio stations, newspapers, regional cable networks, geographically-targeted websites, or other local media. Between 2007 and 2010, broadcast stations' share of local advertising revenue increased from 12.7 percent to 15.8 percent. During that same period, however, total advertising spending across all local media dropped from \$96.2 billion nationwide to \$71.3 billion, and broadcast television stations' collective local advertising revenues declined from \$12.2 billion to \$11.3 billion.

⁷¹⁵ Nexstar 2010 Form 10-K at 28.

⁷¹⁶ Smaller local businesses generally feel a recession's impact more immediately than a large national business, and would be more likely to curtail local television advertising spending. Vogel at 303.

⁷¹⁷ Some broadcast station groups cite higher percentages. Nexstar states that local advertising, excluding political, represented 52.9 percent of its stations' gross revenues (that is, revenues before subtracting agency commissions) in 2010, 60.6 percent in 2009, and 57.0 percent in 2008. Nexstar 2010 Form 10-K at 30. Gray's percentages were nearly identical: 52.9 percent in 2010, 63.2 percent in 2009, and 57.0 percent in 2008. Gray 2010 Form 10-K at 33. LIN's percentages were: 55.1 percent in 2010, 63.2 percent in 2009, and 61.6 percent in 2008. LIN 2010 Form 10-K at 41-42.

⁷¹⁸ NAB, Television Financial Report, 2008, at 2 ("2008 NAB Television Financial Report").

⁷¹⁹ 2011 NAB Television Financial Report at iv. Nexstar states that national advertising represented 18.8 percent of its stations' gross revenues (that is, revenues before subtracting agency commissions) in 2010, 21.2 percent in 2009, and 22.0 percent in 2008. Nexstar 2010 Form 10-K at 30. Gray TV's percentages were nearly identical: 16.7 percent in 2010, 19.9 percent in 2009, and 20.9 percent in 2008. Gray 2010 Form 10-K at 33. LIN's percentages were: 30.6 percent in 2010, 29.9 percent in 2009, and 30.6 percent in 2008. LIN 2010 Form 10-K at 41-42.

Table 18: Local Advertising Revenue by Sector (in millions)⁷²⁰

Revenue	2006	2007	2008	2009	2010
Broadcast TV Stations	\$12,944	\$12,167	\$11,936	\$9,310	\$11,265
Cable TV	\$4,293	\$4,213	\$4,258	\$3,464	\$4,336
Radio	\$15,478	\$15,133	\$13,607	\$10,842	\$11,300
Internet	\$5,871	\$7,576	\$9,023	\$9,233	\$11,146
Daily Newspaper	\$39,124	\$35,204	\$28,744	\$20,397	\$18,574
Regional Sports Networks	\$628	\$718	\$731	\$685	\$759
Mobile	\$0	\$13	\$42	\$81	\$184
Telco	\$1	\$10	\$52	\$60	\$105
Other ⁷²¹	\$21,379	\$21,131	\$19,187	\$15,210	\$13,612
Total Local	\$99,718	\$96,165	\$87,580	\$69,282	\$71,281

218. National advertising time is sold through national sales representative firms (reps) working with advertising agencies, whose clients typically include automobile manufacturers and dealer groups, telecommunications companies, fast food franchisers, and national retailers.⁷²² In exchange for representing the stations, the rep firms typically earn commissions of about seven to eight percent of net billings, defined as dollars paid for advertising minus ad agency commissions.⁷²³ National advertising is generally bought through advertising agencies. The advertising agencies generally receive commissions of 15 percent of the gross advertising rates paid for advertising they place.⁷²⁴ National spot advertising represented about 41.2 percent of total broadcast television station industry revenues, or \$9.4 billion, in 2007, and about 39.1 percent, or \$8.7 billion, of industry revenues in 2010.⁷²⁵ In its television financial reports, NAB estimates that as of 2007, about 36.0 percent of an average station's revenues come from national and regional advertising,⁷²⁶ compared with about 32.0 percent in 2010.⁷²⁷ National advertisers may choose to advertise on broadcast stations but are more likely to utilize arrangements with broadcast networks, cable networks, television syndicators, or DBS. National sales tend to represent a larger proportion of revenues for stations in larger markets.⁷²⁸ Broadcast television stations' share of the

⁷²⁰ SNL Kagan, *Advertising Forecasts: U.S. Market Trends & Data for All Major Media*, 2011 Edition, at 23 ("2011 SNL Kagan Advertising Forecasts").

⁷²¹ "Other" includes the combined advertising revenue totals for the yellow pages, outdoor/out of home, and weekly newspapers for each year.

⁷²² Nexstar 2010 Form 10-K at 6.

⁷²³ Vogel at 312-13, n. 7. Gross advertising revenues refer to the total amount spent by advertisers, while net revenues refer to amount of advertising revenues received by stations.

⁷²⁴ Nexstar 2010 Form 10-K at 28.

⁷²⁵ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011.

⁷²⁶ 2008 NAB Television Financial Report at 2.

⁷²⁷ 2011 NAB Television Financial Report at 2.

⁷²⁸ Vogel at 312-13, n. 7. Sinclair states that it has focused on decreasing its dependence on national advertising, as overall spending by national advertisers has declined, and other outlets have merged. Sinclair 2010 Form 10-K at 38.

national advertising market dropped from 6.8 percent in 2006 to 5.9 percent in 2007. Between 2007 and 2010, broadcast television stations' share of national advertising remained relatively flat, increasing from 5.9 percent to 6.1 percent. Once again, the figures declined during this period from \$9.4 billion (out of \$154.6 billion nationwide) in 2007 to \$8.7 billion (out of \$141.4 billion nationwide) in 2010. In 2006 and 2007, broadcast television networks outranked cable networks and VOD in their collective share of national advertising revenue. In 2008, cable networks and VOD surpassed broadcast television networks in their share. Broadcast television network advertising increased between 2006 and 2008, from \$19.4 billion to \$19.7 billion, fell in 2009 to \$18.1 billion, and rose again in 2010 to \$19.1 billion.

Table 19: National Advertising Revenue by Sector (in millions)⁷²⁹

Revenue	2006	2007	2008	2009	2010
Broadcast TV Stations	\$10,631	\$9,408	\$9,126	\$7,027	\$8,678
Broadcast Networks	\$19,386	\$19,495	\$19,686	\$18,127	\$19,128
Cable & VOD Networks	\$17,728	\$19,228	\$20,629	\$20,452	\$22,372
DBS	\$524	\$691	\$901	\$901	\$842
Internet	\$11,008	\$13,371	\$14,081	\$13,302	\$15,747
Radio	\$3,553	\$3,343	\$2,930	\$2,361	\$2,881
Satellite Radio	\$89	\$98	\$82	\$61	\$76
Radio Network	\$1,112	\$1,153	\$1,150	\$1,048	\$1,102
Daily Newspaper	\$7,495	\$7,005	\$5,996	\$4,424	\$4,221
Barter Syndication	\$2,902	\$2,823	\$3,015	\$2,878	\$2,819
Mobile	\$0	\$238	\$486	\$727	\$1,347
Other ⁷³⁰	\$81,281	\$83,640	\$76,479	\$61,706	\$62,187
National Total	\$155,709	\$160,493	\$154,561	\$133,014	\$141,400

219. Political advertising can be both local and national.⁷³¹ For example, a mayoral candidate may only need to purchase advertising in one DMA in order to reach potential voters, in which case the advertising is local.⁷³² Candidates running for statewide offices, however, or presidential candidates seeking to reach audiences in swing states, will frequently purchase time within multiple DMAs, in which case a national rep firm may purchase time on behalf of the candidates. To get a sense of the trends of political advertising, we examine the historical political revenues of four pure play companies: Gray, LIN, Nexstar, and Sinclair. In 2006, these stations groups collectively earned \$211 million in political advertising, representing nine percent of their net revenues.⁷³³ In 2008, this figure climbed to \$226 million, again representing nine percent of their net revenues. In 2010, it rose to \$244 million, representing ten percent of their revenues. SNL Kagan estimates that, in 2010, broadcast television

⁷²⁹ 2011 SNL Kagan Advertising Forecasts at 23.

⁷³⁰ "Other" includes the combined advertising revenue totals for direct mail, magazines, outdoor/out of home, business publications, yellow pages and farm publications for each year.

⁷³¹ See, e.g., Sinclair 2010 Form 10-K at 42.

⁷³² Kate Brady, *Political Ads: Final Tips From the Rep*, TVNEWSCHECK, Oct. 1, 2010, <http://www.tvnewscheck.com/article/2010/10/01/45773-political-ads-final-tips-from-the-rep> (visited Mar. 3, 2012).

⁷³³ Tony Lenoir, *Broadcast TV Guide to the 2012 Elections*, SNL Kagan, Aug. 24, 2011, at 14.

stations received 75 percent of political advertising revenues.⁷³⁴ NAB estimates that for an average station, political advertising represented 9.0 percent of revenues in 2006,⁷³⁵ 10.1 percent of revenues in 2008,⁷³⁶ and 11.9 percent of its revenues in 2010.⁷³⁷

220. The ability of advertisers to switch among media depends on how they plan their media budgets. Broadcast television media can be purchased in several ways: by flight (*e.g.*, for a one-week period, such as for movie openings or sales), monthly, quarterly, or annually, *i.e.*, the entire media plan at once.⁷³⁸ Annual buys give media buyers leverage to negotiate the best rates. The closer the media buyer is to the beginning of the schedule when placing the buy, the higher the rates will likely be. If the media is sold out, the rates may need to be high enough to bump another advertiser's spots. At times, it may be so close to the flight that the station does not have any space available to sell. On the other hand, buyers who plan annually run the risk of unexpected scheduling changes. For example, a buyer may have purchased advertising time on an NBC affiliate on a Thursday evening, but reached fewer people than expected when a program turned out to be less popular than expected, or a competing network schedules a more popular program during the same time period.

221. *Network Compensation.* Compensation from broadcast networks previously was the second largest revenue stream for network-affiliated broadcast stations. Traditionally networks have compensated affiliates with cash payments closely related to affiliates' local market ratings performances. Since the late 1990s, however, broadcast networks began to phase out these payments. SNL Kagan estimates that between 2006 and 2010, total network affiliate compensation dropped from about \$246.7 million, or 1.0 percent of the total \$24.6 billion in broadcast television station industry revenues, to \$48.2 million, or 0.2 percent of the total \$22.2 billion in industry revenues.⁷³⁹ Belo and Sinclair note that as a condition of renewing their network affiliation agreements, they are required to make cash payments to the networks.⁷⁴⁰

222. *Retransmission Consent Fees.* Retransmission consent fees have replaced network compensation as the second largest source of revenue for broadcast television stations.⁷⁴¹ Like cable networks, broadcast stations are negotiating per subscriber fees from MVPDs in exchange for carriage rights. According to NAB, broadcasters typically offer a menu of options in return for carriage of their stations, among them cash payment, MVPD promotion of the station, purchase of additional advertising

⁷³⁴ *Id.* at 10.

⁷³⁵ NAB, *Television Financial Report*, 2007, at 2.

⁷³⁶ 2009 NAB *Television Financial Report* at 2.

⁷³⁷ 2011 NAB *Television Financial Report* at 2.

⁷³⁸ Kerri Byrd, *What to Know About an Annual Media Buy*, Evok Advertising, Dec. 21, 2010, <http://www.evokad.com/2010/12/what-to-know-about-an-annual-media-buy/> (visited Dec. 2, 2011).

⁷³⁹ SNL Kagan, *TV Station Deals Databook*, 2009 Edition, at 9; Tony Lenoir, *A Look at the Evolution of the Networks-Affiliates Relationship*, SNL Kagan, Jan. 3, 2011, at 9-10.

⁷⁴⁰ Belo states that in 2010 it renewed its network agreements with ABC in four DMAs and CBS in three DMAs. Belo 2010 Form 10-K at 5. Sinclair specifies that it pays an annual license fee to ABC and a programming fee to FOX. Sinclair 2010 Form 10-K at 26. Likewise, Nexstar, referring to affiliation agreements with ABC and FOX, notes that as its network affiliation agreements come up for renewal, it may be required to make cash payments to the networks or accept other material modifications of existing affiliation agreements. Nexstar 2010 Form 10-K at 14. See also LIN 2010 Form 10-K at 27. As of 2011, NAB began reporting network programming as an expense rather than a revenue source. See 2011 NAB *Television Financial Report* at ii.

⁷⁴¹ 2011 SNL Kagan *TV Stations Databook* at 5.

by the MVPD, payment by the MVPD for video-on-demand rights, and carriage of other commonly owned stations, other program services, or digital multicast streams.⁷⁴² Since the last report, retransmission consent fees have increased in dollar terms and as a share of industry revenues. Based on Commission staff analysis of data from SNL Kagan, retransmission consent fees represented about 0.9 percent, or \$214.6 million in broadcast television station industry revenues in 2006, and about 4.2 percent, or \$ 931.8 million in 2010.⁷⁴³

223. NAB estimates that in 2009 affiliates of the four major broadcast networks received on average about \$0.14 per subscriber per month in retransmission consent fees, which it contends are less than fees earned by cable networks.⁷⁴⁴ Broadcast television networks have asserted to their affiliates that they, as owners or licensees of programming that the affiliates broadcast and offer for retransmission, are entitled to a portion of the compensation under the retransmission consent agreements. Networks have proposed to include a requirement to share retransmission consent fees in their network affiliation agreements.⁷⁴⁵

224. In recent years, the broadcast networks have streamed their content on the Internet and other distribution platforms, and in some cases, in close proximity to network programming broadcast on local television stations.⁷⁴⁶ In addition, in January 2010 FOX reportedly reached an agreement with Time Warner Cable to provide a direct feed of its network programming for up to one year in the event of a retransmission consent standoff with an affiliate group. Concerns about the potential of Comcast to bypass NBC affiliates with a direct network feed to Comcast systems led the Commission to impose an “affiliate integrity” condition when it approved the Comcast-NBC Universal transaction.⁷⁴⁷ The provision

⁷⁴² NAB 7/8/11 Reply Comments, Attachment B at 38.

⁷⁴³ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. See also *supra*, Table 17. For Nexstar, retransmission consent revenues (consisting of a per-subscriber-based compensatory fee and excluding advertising revenue) represented 4.8 percent of net revenues in 2008, 9.3 percent in 2009, and 9.1 percent in 2010. Nexstar 2010 Form 10-K at 30. Nexstar explains that the increases are due to renegotiated contracts providing for higher rates per subscriber, as well as the addition of another television station in 2009. Similarly, Gray’s retransmission consent revenues increased due to improved terms of renegotiated contracts, representing 0.9 percent of revenues in 2008, 5.8 percent in 2009, and 5.4 percent in 2010. Gray 2010 Form 10-K at 33. Neither LIN nor Sinclair break out retransmission consent revenues separately. See 2010 Form LIN 10-K at 41-42; Sinclair 2010 Form 10-K at 42.

⁷⁴⁴ NAB 7/8/11 Reply Comments, Attachment A at 43-44. Nexstar CEO Perry Sook has noted that MVPDs may be less willing to pay for broadcast stations than cable networks, because they are unable to sell advertising time during broadcast network programming, while cable networks give MVPDs a fixed amount of inventory to sell. Robin Flynn, *Network Affiliates Defend Retrans Stance at SNL Kagan Event*, SNL Kagan, June 22, 2011, at 10.

⁷⁴⁵ According to CBS CEO Leslie Moonves, “[a]s each new affiliate agreement comes up, there will be a sharing of [retransmission consent] fees: it’s in the very early stages. There’s a realization that . . . [affiliates are] getting [retransmission consent fees] because of [a] network providing NFL, 60 Minutes, and Letterman.” Claire Atkinson, *CBS Retrans Fees Expected to Double in 2010*, BROADCASTING & CABLE, Nov. 5, 2009, http://www.broadcastingcable.com/article/383011-CBS_Retrans_Fees_Expected_to_Double_in_2010.php (visited Jan. 20, 2012). In the Fall of 2011, Moonves predicted that the combined O&O retransmission consent revenues and fees the network will collect from affiliates will represent a total of \$600 million to \$700 million “over the next three to five years” CBS Corp., *2Q Earnings Call*, Corrected Transcript, Aug. 2, 2011, at 11-12.

⁷⁴⁶ LIN 2010 Form 10-K at 27; Belo 2010 Form 10-K at 10. See also *infra*, Sec. V.A.

⁷⁴⁷ The Commission made this determination based on its belief that “once Comcast obtains a controlling interest in NBCU, it will have an even greater incentive and ability to bypass the NBC affiliates to advantage its cable systems in retransmission consent disputes. Moreover, since the *News Corp-Hughes Order*, the retransmission consent process has become more contentious. In this heated negotiating atmosphere, we believe that Comcast, as the (continued....)

bans NBC from sending a direct feed of its network to Comcast cable systems until 2021 (ten years from the order's adoption) or until one of NBC's major competitors – ABC, CBS, or FOX – opts to authorize a same-day linear feed to one or more major cable system operators, whichever is later.⁷⁴⁸

225. Station groups vertically integrated with broadcast networks, such as CBS and ABC, and those affiliated with cable networks, may have more leverage than other station owners, since they can integrate retransmission consent negotiations with carriage of their networks. Group owners may be able to earn more than individual station owners because they have more experience and leverage with MVPDs.⁷⁴⁹ Stations in smaller markets may not earn as much in total dollars from retransmission consent fees because there are not as many subscribers, but they may earn the same per-subscriber fees as stations in larger markets.⁷⁵⁰

226. *Ancillary DTV Revenues.* DTV allows broadcasters to use part of their licensed spectrum to provide non-broadcast “ancillary or supplementary” services (*e.g.*, subscription video, data transfer, or audio signals), provided they pay the Commission a five percent fee of gross revenues received from such services.⁷⁵¹ Compared with other revenue sources, revenues from ancillary services are nascent, but growing. Commercial and noncommercial educational DTV broadcast station licensees report annually whether they have provided ancillary services at any time during the 12 month period preceding September 30. Licensees that earn revenues from such services are required to pay fees to the Commission. As of the 2011, gross revenues from feeable services are modest.⁷⁵² Yearly numbers are as follows:

(Continued from previous page)

nation's largest cable operator with control of a broadcast network, would have an increased incentive to engage in affiliate bypass.” *Comcast-NBCU Order*, 26 FCC Rcd at 4311, ¶ 174.

⁷⁴⁸ The Commission decided to sunset this condition given that “the video marketplace is changing.” “[I]n light of [this] evolution,” the Commission was “reluctant to impose indefinite terms for [a] condition[] based upon the contractual provisions with fixed terms negotiated by the parties.” *Id.* at 4312, ¶ 178.

⁷⁴⁹ Nexstar Broadcasting President and CEO Perry Sook states that “size matters . . . when dealing with networks and MVPD[s]” Nexstar Broadcasting Group, Inc., *4Q Earnings Call*, Transcript, Mar. 10, 2011, http://seekingalpha.com/article/257622-nexstar-broadcasting-group-s-ceo-discusses-q4-2010-results-earnings-call-transcript?part_qanda (visited Jan. 12, 2012).

⁷⁵⁰ Titan Broadcast Management, *Titan Marches to a Different Drummer*, Aug. 11, 2010, <http://www.titanbroadcast.com/story/12962571-titan-marches-to-a-different-drummer> (visited Jan. 12, 2012).

⁷⁵¹ *Filing of FCC Annual DTV Ancillary/Supplementary Services Report*, Public Notice, 18 FCC Rcd 23972, 23973 (MB 2003). See also 47 U.S.C. § 336(a)(2), (e).

⁷⁵² FCC Form 317. Fees are reported in the year received, although they may be for services rendered in past years, in future years, or both. This occurs very few times and involves small sums of money. The 2006 numbers are higher than those provided in the *13th Report* because of late filers. Starting in 2009, some licensees reported that they provided some ancillary and supplemental services that generate fees and some services that do not generate fees. As broadcast stations decide to use DTV for broadcasting rather than ancillary services, *e.g.*, to launch a new network such as Bounce TV, fluctuations in the reported figures for non-broadcast ancillary services may occur.

Table 20: Ancillary DTV Revenues

Predominant Year	Number of DTV Licensees That Reported Feeable Services	Gross Revenues From Feeable Services	Fees Collect From Feeable Services
1999	0	\$0	\$0
2000	4	\$570,000	\$28,500
2001	2	\$390,000	\$19,500
2002	6	\$148,280	\$7,414
2003	3	\$45,000	\$2,250
2004	10	\$78,625	\$3,931
2005	11	\$176,777	\$8,839
2006	38	\$798,153	\$39,888
2007	35	\$417,649	\$20,868
2008	54	\$337,857	\$16,897
2009	57	\$2,044,454	\$102,223
2010	99	\$7,125,374	\$356,268
2011	85	\$841,177	\$42,059

227. *Online Revenues.* In addition to selling advertising time over-the-air, stations sell advertising on their websites. While estimates of the percentage of revenue broadcast television stations earn from online advertising vary, they all indicate that such revenue has grown since the last report. SNL Kagan estimates that online revenues represented about \$586.9 million, or 2.4 percent of \$24.6 billion in the total broadcast station industry revenues in 2006, and 4.9 percent, or \$1.1 billion of the \$22.0 billion in total broadcast television station industry revenues in 2010.⁷⁵³ Other sources have slightly higher or lower estimates. For example, Borrell estimates that, based on its survey of a select number of television stations, online revenues were six percent of total broadcast television station revenues in 2010, compared with 3.5 percent in 2007.⁷⁵⁴ In its TV Financial Reports, NAB estimates that in 2010, online advertising represented about \$353,145, or 0.2 percent of an average station's \$16.175 million in net revenues,⁷⁵⁵ compared with \$226,892, or 0.3 percent of an average station's \$16.148 million in net revenues in 2007.⁷⁵⁶

228. Borrell also estimated the total amount of money advertisers spent on local online advertising nationwide, and the share represented by broadcast television station websites. Borrell considers broadcast television stations sites to primarily compete with the websites of other local media, such as newspapers' websites as well as online sites unaffiliated with a media entity, e.g., Craigslist and

⁷⁵³ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. According to NAB, in 2010, Internet revenues represented 2.2 percent of an average station's net revenues. *2011 NAB Television Financial Report* at 2.

⁷⁵⁴ Borrell Study at 6.

⁷⁵⁵ *2011 NAB Television Financial Report* at 2. NAB calculates online revenue as a percentage of a broadcast station's net revenue (i.e., the amount spent by advertisers on a station (gross advertising revenues) – advertising agency commission – national and regional sales rep firm commission = all other sources of station revenue).

⁷⁵⁶ *2008 NAB Television Financial Report* at 2.

Patch.⁷⁵⁷ According to Borrell, between 2009 and 2010, broadcast television stations increased their market share of local online advertising. Borrell estimates that television broadcasters accounted for 10.4 percent, or about \$1.4 billion of the \$13.5 billion spent on local online advertising in 2010, up from 9.3 percent, or \$1.2 billion in 2009.⁷⁵⁸ It states that the average station's market share depended on market size, with the stations in the smallest markets averaging 2.2 percent of local online advertising and larger-market stations averaging 0.5 percent of local online advertising, due to heavy competition from stand-alone sites and other local media. Borrell posits that a performance gulf has emerged between stations that have invested heavily in their websites and those that have not.⁷⁵⁹ One percent of television station websites surveyed made more than \$5 million in 2010, while 52 percent of station sites surveyed by Borrell made less than \$500,000.

229. *Other Revenues.* Advertising revenues from mobile services and applications are still nascent for most stations. NAB estimates that mobile revenues represented \$7,089, less than 0.05 percent of an average station's total \$16,175,476 in net revenues in 2010.⁷⁶⁰ In Borrell's survey, few stations reported any advertising revenue from mobile applications in 2010, and of those that did, mobile advertising represented on average 2.5 percent of total revenues, with the typical station getting between \$20,000 and \$50,000.⁷⁶¹ NAB estimates that in 2010 advertising revenues from multicast channels represented about 0.4 percent of an average station's total net revenues.⁷⁶²

c. Profitability

230. To assess profitability trends in the broadcast television station sector between 2006 and 2010, we consider data on a station-level basis, using benchmarks in NAB's Television Financial Reports and, on a company-level basis, examining companies that have been pure-play broadcast television companies throughout the relevant period. When entering the broadcast television station industry, companies often buy or sell individual stations or the portfolio of assets of a broadcast television station group owner based on a multiple of profitability.⁷⁶³

⁷⁵⁷ Borrell Study at 14.

⁷⁵⁸ *Id.* at 6, 8. For its calculations, Borrell relied on two databases: one that estimated online advertising spending by more than 15 million U.S. and Canadian companies, and one that estimates online advertising receipts by more than 4,400 U.S. and Canadian online media companies that participate in its surveys. *Id.* at 32.

⁷⁵⁹ *Id.* at 6. For example, LIN has invested heavily in websites, mobile applications, and other digital technologies. It states that since the launch of its digital businesses in 2007, digital revenues, including retransmission consent revenues, have grown nearly 309 percent and as of 2010 comprised 15 percent of its total net revenues. LIN 2010 Form 10-K at 8. In addition to paying LIN retransmission consent revenues for carriage of its broadcast signals, MVPDs pay LIN for online and advertising media services through its subsidiary online Red McCombs Media, L.P. *See id.*

⁷⁶⁰ 2011 NAB Television Financial Report at 2. NAB defines mobile revenue as any revenue derived directly from streaming to mobile devices. *Id.* at 164.

⁷⁶¹ Borrell Study at 22. Borrell defines mobile advertising as advertising derived from mobile applications. *Id.* at 5-7. Borrell states that "[b]y 2015, most forecasters agree, the majority of all 'online' advertising will become untethered from desktops and delivered to mobile devices such as iPads, smart phones, and GPS-enabled laptops." *Id.* at 7.

⁷⁶² 2011 NAB Television Financial Report at 2. To calculate total net revenues, NAB subtracts agency and rep firm commission for gross advertising revenues, and adds all other forms of revenue.

⁷⁶³ Vogel at 307-10. *See also* Price Colman, *For Sale: Young Broadcasting for Just \$350M*, TVNEWSCHECK, June 30, 2011, <http://www.tvnewscheck.com/article/2011-06-30/52237-for-sale-young-broadcasting-for-just-350m> (visited Mar. 25, 2012).

Table 21: Broadcast Television Station Industry Profitability⁷⁶⁴

a. Net Operating Revenue (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186
Average NAB Station	\$16,850	\$16,147	\$15,837	\$13,454	\$16,175

b. (Recurring) EBITDA (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$88,710	\$84,443	\$95,741	\$59,958	\$112,656
Gray	\$125,538	\$92,511	\$113,507	\$68,623	\$136,160
LIN	\$133,348	\$120,297	\$122,619	\$81,091	\$141,806
Sinclair	\$244,853	\$221,083	\$232,905	\$199,550	\$295,696
Average NAB Station	\$6,290	\$5,258	\$4,704	\$3,072	\$5,498

c. Net Income before Taxes (in thousands) ⁷⁶⁵					
	2006	2007	2008	2009	2010
Nexstar	(\$5,173)	(\$13,966)	(\$83,375)	(\$12,414)	\$4,926
Gray	\$21,534	(\$35,694)	(\$313,027)	(\$34,307)	\$36,610
LIN	(\$300,748)	\$46,755	(\$1,052,552)	\$23,400	\$56,724
Sinclair	\$55,091	\$39,215	(\$369,884)	(\$170,460)	\$113,851
Average NAB Station	\$4,210	\$3,321	\$2,686	\$1,126	\$3,863

231. We use NAB average station financial statistics as an indicator of profitability: station EBITDA (which NAB calls “cash flow”) and station pre-tax profits. NAB calculates an average broadcast television station’s cash flow by subtracting station operational expenses (expenses from all of the station’s departments: engineering, programming, production, news, sales, advertising and promotions, and general administrative expenses) from total net revenues, which are gross advertising revenues minus agency commissions and national and regional rep firm commissions. Similarly, we can examine the recurring EBITDA⁷⁶⁶ of a select group of broadcast television station group owners (Nexstar,

⁷⁶⁴ FCC staff estimates based on data from NAB Financial Reports and SNI. Kagan.

⁷⁶⁵ Each of the station groups incurred non-cash expenses by writing down the values of, among other assets, their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.

⁷⁶⁶ Recurring earnings before interest, taxes, depreciation and amortization. SNI. Kagan. Nexstar EBITDA and FCF (Free Cash Flow) Analysis. Free cash flow is a measure of financial performance calculated as operating cash flow minus capital expenditures. It represents the cash that a company is able to generate after laying out the money required to maintain or expand its asset base. Investopedia. *Dictionary: Free Cash Flow*, <http://www.investopedia.com/terms/f/freecashflow.asp#axzz1qAPtGrjM> (visited Mar. 25, 2012).

Gray, LIN, and Sinclair) that have been pure-play broadcast television station companies between 2006 and 2010. Recurring EBITDA excludes earnings or losses from nonrecurring events, such as the gain or sale of assets, early retirement of debt, restructuring, or asset write-downs, and facilitates consideration prior to widely varying debt-financing arrangements.⁷⁶⁷ For the purpose of this Report, we believe recurring EBITDA and EBITDA are better indicators of profitability within the broadcast television industry than pre-tax income, which incorporates revenues and expenses from extraordinary events, as well as interest payments on debt.

232. To better compare trends among a single station and select station groups, we can calculate the profit margins, *i.e.*, EBITDA (or recurring EBITDA) divided by net operating revenues, (*i.e.*, revenues earned by the station or station group, minus commissions from advertising agencies and rep firms). Generally, the broadcast station groups performed in the range of the NAB figures. As measured by recurring EBITDA/net operating revenues, profit margins in 2007 ranged from 30.1 percent for Gray, to 31.7 percent for Nexstar, slightly lower than NAB's average of 32.6 percent. In 2008, the station groups' profit margins were higher than NAB's average of 29.7 percent, ranging from 30.7 percent for LIN, to 34.7 percent for Nexstar. In 2009, the NAB average station and the station groups all recorded a marked decline in profitability. The average NAB station was at the low end, with a 22.8 percent margin. For the station groups, profit margins ranged from 23.8 percent for Nexstar to 30.4 percent for Sinclair. Profitability bounced back in 2010, with the NAB average station's profitability in the middle. The NAB average station had a profit margin of 34.0 percent, while the margins for the station groups ranged from 33.8 percent (LIN) to 38.5 percent (Sinclair).

233. As noted above, broadcast station revenues tend to be higher in even-numbered years, primarily due to the influx of political advertising, but NBC affiliates also earn additional revenues during NBC's coverage of the Olympics. Additional reasons for the improvement in 2010 include an overall upswing in economic conditions, recovery in advertising spending by the top advertising categories, strong political spending, rapid growth and high incremental margins in both station website revenues, and retransmission consent revenues.⁷⁶⁸ In addition, some stations have increased profit margins by decreasing expenses.⁷⁶⁹ Several station groups incurred non-cash expenses by writing down the values of, among other assets their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.⁷⁷⁰

d. Investment and Innovation

234. As in our analysis of profitability, we analyze broadcast station industry investment trends by examining (1) an average television station's average capital expenditures divided by net operating income and (2) a sample of pure-play television broadcasting companies' capital expenditures divided by net income.

⁷⁶⁷ Vogel at 308-09.

⁷⁶⁸ Nexstar 2010 Form 10-K at 29.

⁷⁶⁹ For example, in 2009, Nexstar began regionalizing certain accounting and traffic functions, resulting in layoff of 93 employees. Nexstar estimates that the restructuring saves the company about \$2.2 million per year. Nexstar 2010 Form 10-K at 34.

⁷⁷⁰ Nexstar 2010 Form 10-K at 34; Gray 2010 Form 10-K at 39; LIN at 43; Sinclair 2010 Form 10-K at 38-39.

Table 22: Broadcast Television Station Industry Investment⁷⁷¹

a. Capital Expenditures (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$26,345	\$18,541	\$30,793	\$19,028	\$13,799
Gray	\$41,139	\$24,605	\$15,019	\$17,756	\$19,395
LIN TV	\$22,294	\$25,290	\$28,537	\$10,247	\$17,648
Sinclair	\$16,923	\$23,226	\$25,169	\$7,693	\$11,694
Average NAB Station	\$785	\$826	\$970	\$495	\$541

b. Net Operating Revenue (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186
Average NAB Station	\$16,850	\$16,147	\$15,837	\$13,454	\$16,175

235. The capital expenditure ratio for the NAB average station tended to fall in the mid-range of the ratios of the television station groups. Sinclair consistently spent the lowest proportion of net revenues on capital expenditures, in part because Sinclair's net revenues are nearly twice as large as the revenues of the other station groups we examined.⁷⁷² The average NAB station spent 5.1 percent of net revenues on capital expenditures in 2007. This compares with a range of 3.2 percent for Sinclair to 8.0 percent for Gray. In 2008, the average NAB station spent 6.1 percent of net revenues on capital expenditure, compared with a range of 3.3 percent for Sinclair Broadcasting to 10.8 percent for Nexstar. In 2009, these figures fell to 3.7 percent for the NAB average station, and a range of 1.2 percent for Sinclair Broadcasting to 7.6 percent for Nexstar. In 2010, these figures fell to 3.3 percent for the NAB average station, and a range of 1.5 percent for Sinclair to 5.6 percent for Gray Television.

236. Between 2006 and 2008, the majority of Nexstar's capital expenditures went towards preparing for the transition from analog to digital television.⁷⁷³ Nexstar attributes its decline in capital expenditures between 2008 and 2010 primarily to the completion of the digital conversions in 2009 and early 2010.⁷⁷⁴ Station groups have also been upgrading their newscasts to HD format, purchasing new studio equipment, and adding programming to their digital multicast channels.⁷⁷⁵ Stations also are investing in creating multimedia products to attract new audiences and increase loyalty to their stations.⁷⁷⁶ For example, in 2009, LIN purchased an online advertising and media services company to expand its

⁷⁷¹ FCC staff estimates based on data from NAB Financial Reports and SNL Kagan.

⁷⁷² Sinclair also claims that duopolies and LMAs enable it to realize significant economies of scale in capital expenditures. Sinclair 2010 Form 10-K at 10.

⁷⁷³ Nexstar 2010 Form 10-K at 36.

⁷⁷⁴ *Id.*

⁷⁷⁵ Gray 2010 Form 10-K at 22, 46.

⁷⁷⁶ LIN 2010 Form 10-K at 7-8.

online and mobile offerings; it also has developed iPhone, BlackBerry, Droid, and iPad applications for each of its television stations. In addition, LIN has launched a website called onPolitix.com, that provides local, regional, and national political coverage.

C. Online Video Distributors

1. Introduction

237. For the purposes of assessing the OVD industry in this Report, we define OVDs as entities that distribute video content to consumers over the Internet.⁷⁷⁷ This section of the Report examines the structure, conduct, and performance of OVDs. Internet-based distribution of video content has increased substantially since the last report, evolving from a niche service into a thriving industry.⁷⁷⁸ Today, online video reaches consumers via multiple devices, including computers, smartphones, tablets, gaming consoles, television sets, and other equipment connected to the Internet. According to Nielsen, approximately 48 percent of Americans now watch video online, and 10 percent watch mobile video.⁷⁷⁹ Consumers stream or download video content at home, as well as at libraries, work, airports, Wi-Fi hotspots, and other locations. The number and diversity of OVD industry participants also have grown, and now include stand-alone distributors, programmers, content producers/owners (including broadcasters), and subsidiaries of the largest hardware, software, and online delivery companies.

238. For the purposes of assessing the OVD industry in this Report, we examine entities that offer video content that is similar to the professional programming traditionally exhibited by broadcast stations, or broadcast and cable networks, and which is usually created or produced by media and entertainment companies using professional-grade equipment, talent, and production crews that hold or maintain the rights for distribution. We distinguish professionally-produced content from both (1) semi-professionally produced video, which refers to consumer or user-generated content that has professional or industrial qualities (e.g., shot with professional-grade equipment, using professional talent), and which may be produced exclusively for online audiences; and (2) user-generated content that is publicly available, created or produced by end users, often with little to no brand equity or brand recognition.⁷⁸⁰

239. As discussed in more detail below, the OVD marketplace is continuing to grow and develop. Indeed, as the Commission noted in the recent *Comcast-NBCU Order*, “[b]y all accounts, OVD services have just begun” and “[n]ew OVD services and new deals are announced seemingly daily.”⁷⁸¹ Businesses continue to enter and exit the marketplace, as well as change their approaches to providing OVD service. As a result, while this section covers several of the major players in the OVD space, it does not attempt to address all, or even most, of the providers currently in the market.

⁷⁷⁷ See *supra*, n. 6; *Further Notice*, 26 FCC Red at 14112, ¶ 52. To the extent that MVPDs also provide video to their subscribers online, for example as part of triple-play or TV Everywhere service, those offerings are discussed *supra*, Sec. III.A. We note, however, that, in the future, some MVPDs may distribute video content online to non-subscribers as well. See, e.g., *infra*, ¶ 281.

⁷⁷⁸ See, e.g., Comcast 6/8/11 Comments at 31-36; NCTA 6/8/11 Comments at 19-21; DIRECTV 6/8/11 Comments at 22-24; Google 6/8/11 Comments at 5-6.

⁷⁷⁹ See Nielsen, *The Cross-Platform Report, Quarter 2, 2011*, at 1.

⁷⁸⁰ See, e.g., *Comcast-NBCU Order*, 26 FCC Red at 4298-99, ¶¶ 144-46 & n. 365; Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, Counsel, Comcast Corporation, *et al.*, MB Docket No. 10-56, Attach. at 3-6, 8-9, 14 (May 21, 2010).

⁷⁸¹ *Comcast-NBCU Order*, 26 FCC Red at 4268-69, ¶¶ 78-80.

240. In the *Comcast-NBCU Order*, the Commission found that, while the amount of online viewing is growing, cord-cutting of traditional video programming service is relatively infrequent, and most consumers consider OVD service to be a complement to, rather than a substitute for, their MVPD service.⁷⁸² While recognizing that the Internet has evolved into a powerful method of video content distribution, the Commission did not determine whether or not online video competes with MVPD services.⁷⁸³ Instead, the order concluded that, regardless of whether online video currently is a complement to or a substitute for MVPD service, it is potentially a substitute product.⁷⁸⁴ The state of the current market suggests no reason to revisit this conclusion for purposes of this Report.

2. OVD Structure

241. We begin our consideration of OVDs with an examination of the industry structure. This discussion will address some of the major players in today's OVD marketplace, including programmers and content producers/owners, affiliates of online services and affiliates of manufacturers, retailers and other businesses. We then explain horizontal concentration and vertical integration in the market. Next we describe conditions affecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry into and exit from the OVD market.

242. Since the last report, the OVD marketplace has expanded tremendously, with the industry's structure and operations continuing to develop. Most notably, there has been an increase in the number and type of OVDs, the amount of online video content available, and the devices used for delivery of that programming.⁷⁸⁵

243. While the structure of the OVD industry is still evolving, a few trends have emerged. To begin with, unlike an MVPD, whose market typically is tied to the provider's own facilities-based infrastructure, or a broadcaster, whose market typically is defined by the station's signal coverage area and DMA, an OVD's market generally covers the entire national broadband footprint. Also, much of the OVD industry does not provide stand-alone, unaffiliated delivery of video content. Rather, as discussed below, many OVD providers are affiliated with other video content owners or programmers (including broadcasters); online services; or manufacturers, retailers, or other businesses.

244. *Programmers and Content Producers/Owners.* Individual content owners or programming networks make their programming available online on their websites, sometimes referred to as "verticals" or "portals."⁷⁸⁶ The websites may be brand extensions of existing media properties and/or contain content unique to the Internet. Mobile applications, which often provide access to video content,

⁷⁸² *Id.* at 4269, ¶ 79.

⁷⁸³ *Id.* at 4256, ¶ 41.

⁷⁸⁴ *Id.* Some commenters in this proceeding argue that OVDs already are becoming true substitutes for traditional MVPD service or that consumers may well see OVDs as substitutes for MVPD service in the future. *See, e.g.,* DIRECTV 6/8/11 Comments at 22-25; Digital Broadcasting 6/8/11 Comments at 32.

⁷⁸⁵ *See* OVD viewership information, *infra*, Sec. III.C.4.a.

⁷⁸⁶ *See, e.g.,* ABC, <http://abc.go.com/watch> (visited Feb. 13, 2012) ("ABC Network Portal"); NBC, <http://www.nbc.com/> (visited Feb. 13, 2012) ("NBC Network Portal"); CBS, <http://www.cbs.com/> (visited Feb. 13, 2012) ("CBS Network Portal"); FOX, <http://www.fox.com/> (visited Feb. 13, 2012) ("FOX Network Portal"). In addition, local television stations often act as OVDs by making video content, for example clips from their own newscasts, available online. *See, e.g.,* KLAS-TV, <http://www.8newsnow.com/category/28259/8-news-now-video> (visited Feb. 13, 2012); WFAA-TV, <http://www.wfaa.com/video/> (visited Feb. 13, 2012). *See also* NAB 6/8/2011 Comments at 27-29 (noting extensive efforts of local television stations to make news content available online).

also are an integral part of the user interface strategy for many content producers and programming networks.⁷⁸⁷

245. Portals take different approaches to making content available online, often reflecting concern that online strategies may undercut revenues for the portal's traditional mode of distribution or due to contract restrictions. For example, Comedy Central distributes the most recent episodes of *The Daily Show* and *The Colbert Report* online right after those programs initially air.⁷⁸⁸ FOX, on the other hand, limits free next-day streaming of its shows to subscribers of approved cable and satellite distributors (currently, only DISH Network) and subscribers of the Hulu Plus OVD; all others must wait eight days.⁷⁸⁹ Similarly, HBO Go – HBO's mechanism for making its content available online – is available only to those who already subscribe to HBO via an MVPD.⁷⁹⁰

246. Hulu, which is owned by News Corporation, NBCUniversal, The Walt Disney Company, and Providence Equity Partners, brings together content from over 260 content companies, including its joint venture participants.⁷⁹¹ Hulu began as a free service, with programming available only via computer and only in standard definition.⁷⁹² In June 2010, Hulu added a subscription service, Hulu Plus, which allows consumers to view programming in 720p high definition (where available) on Internet-connected televisions and other devices, and includes additional content with limited advertisements.⁷⁹³

247. Sports leagues participate in the OVD marketplace as well. The four largest U.S. professional sports leagues – Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League – make a large amount of their programming

⁷⁸⁷ See, e.g., TBS, *TBS Mobile*, <http://www.tbs.com/mobileapp.jsp> (visited Feb. 13, 2012) (providing a TBS mobile app with access to some TBS shows, including *Conan*, *Meet the Browns*, and *The Office*); NBC, *Apps & Mobile*, <http://www.nbc.com/mobile/> (visited Feb. 13, 2012) (featuring link to NBC app, which allows mobile users to watch full episodes of NBC shows); Vlad Savov, *HBO Go App Set to Stream its Way to iPhones, iPads and Android Devices*, Engadget, Apr. 19, 2011, <http://www.engadget.com/2011/04/19/hbo-go-app-set-to-stream-its-way-to-iphones-ipads-and-android-d/> (visited Feb. 13, 2012) (discussing apps for viewing HBO content on mobile devices).

⁷⁸⁸ See Comedy Central, *The Daily Show*, <http://www.thedailyshow.com/> (visited Feb. 13, 2012); Comedy Central, *Colbert Nation*, <http://www.colbertnation.com/> (visited Feb. 13, 2012).

⁷⁸⁹ Brian Stetler, *FOX to Limit Next-Day Streaming on Hulu to Paying Cable Customers*, N.Y. TIMES, July 26, 2011, http://www.nytimes.com/2011/07/27/business/media/fox-to-limit-next-day-streaming-on-hulu.html?_r=1 (visited Feb. 13, 2012).

⁷⁹⁰ John Paul Titlow, *HBO Go Expands, But Cord Cutters Are Still Out of Luck*, ReadWriteWeb, Dec. 19, 2011, http://www.readriteweb.com/archives/hbo_go_not_without_cable.php (visited Feb. 13, 2012); Jeff Roberts, *HBO To Cord Cutters: You'll Never See Our Shows*, PaidContent.org, Nov. 30, 2011, <http://paidcontent.org/article/419-hbo-to-cord-cutters-youll-never-see-our-shows/> (visited Feb. 13, 2012).

⁷⁹¹ Hulu, *About*, <http://www.hulu.com/about> (visited Feb. 13, 2012) ("About Hulu"). Hulu began in March 2007 as a joint venture between News Corp., NBC Universal and Providence Equity Partners, with Disney joining the fold in April 2009. See Hulu, *Company Timeline*, http://www.hulu.com/about/company_timeline (visited Feb. 13, 2012) ("Hulu Timeline"); Hulu, *Disney to Join NBC Universal, News Corporation and Providence Equity Partners as an Equity Owner of Hulu* (press release), Apr. 30, 2009.

⁷⁹² See Hulu Timeline: Hulu, *Hulu Blog, Introducing Hulu Plus: More Wherever. More Whenever. Than Ever.*, June 29, 2010, <http://blog.hulu.com/2010/06/29/introducing-hulu-plus-more-wherever-more-when-ever-than-ever/> (visited Feb. 24, 2012) ("Introducing Hulu Plus").

⁷⁹³ See *id.*; Hulu Timeline: Introducing Hulu Plus; Robert Briel, *Hulu Launches Premium Service Hulu Plus*, Broadband TV News, June 29, 2010, <http://www.broadbandtvnews.com/2010/06/29/hulu-launches-subscription-service-hulu-plus/> (visited Feb. 13, 2012); David Einstein, *Going Mobile With Internet, TV*, S.F. CHRONICLE, May 23, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/22/BU221JHC9S.D1L> (visited Feb. 13, 2012).

available online through paid subscription services.⁷⁹⁴ Collegiate sports leagues are following a similar path. For example, the Atlantic Coast Conference recently announced the launch of the ACC Digital Network, a fully programmed video network designed, produced, and distributed exclusively for audiences watching on connected devices such as laptops and smartphones.⁷⁹⁵ The ACC Digital Network is a joint venture between Raycom Sports, the conference's long-standing broadcast and marketing partner, and Silver Chalice Ventures, a digital media company.⁷⁹⁶ The content is available without charge, supported by sponsorship and advertising.⁷⁹⁷ Similarly, the Big Ten recently unveiled a new Internet offering, BTN2Go, which provides streams of Big Ten games, as well as original and studio programming, to consumers who subscribe to the Big Ten Network on Time Warner Cable, Charter Communications, DIRECTV or DISH Network.⁷⁹⁸ The league makes the content available via the web, smartphones, and tablets.⁷⁹⁹ Content is available for free to consumers who already subscribe separately to the Big Ten Network.⁸⁰⁰

248. Sony is, among other things, a producer and owner of video content. Sony's Crackle OVD service, which launched in Summer 2007, offers a wide variety of free, streaming online content, including movies, television shows, and original programming, much of which comes from Sony's own content library.⁸⁰¹

⁷⁹⁴ See Major League Baseball, *MLB.tv*, <http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=mlbtv&affiliateId=MLBTVREDDIRECT> (visited Feb. 13, 2012); National Basketball Association, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 13, 2012); DIRECTV, *NFL Sunday Ticket*, <http://www.directv.com/D1VAPP/content/sports.nfl> (visited Feb. 13, 2012) ("NFL Sunday Ticket"); National Hockey League, *NHL Gamecenter Live*, <https://gamecenter.nhl.com/nhlgc/secure/gc/signup> (visited Feb. 13, 2012). NFL Sunday Ticket is available through DIRECTV, which makes games available via multiple platforms, including smartphones, tablets, and the Sony Playstation 3. See NFL Sunday Ticket; Playstation, *NFL Sunday Ticket*, <http://us.playstation.com/psn/nfl/> (visited Feb. 13, 2012). A customer who subscribes to NFL Sunday Ticket via the PlayStation Network need not be a DIRECTV subscriber. See Scott Stein, *NFL Sunday Ticket Comes to the PlayStation 3*, CNET, Aug. 17, 2011, http://news.cnet.com/8301-17938_105-20093727-1/nfl-sunday-ticket-comes-to-the-playstation-3/ (visited Feb. 29, 2012) ("NFL To PlayStation"). NBA, MLB, and NHL games are also available via Apple's digital media receiver, Apple TV. See Dan Frommer, *Apple TV Now Has MLB TV And NBA Live Game Streaming*, Business Insider, Mar. 9, 2011, http://articles.businessinsider.com/2011-03-09/tech/30032181_1_boxee-roku-mlb-tv (visited Feb. 13, 2012); Jonathan Self, *Apple TV 4.4 Update Adds Photo Stream, NHL, and More*, MACWORLD, Oct. 12, 2011, http://www.macworld.com/article/162974/2011/10/apple_tv_4_4_update_adds_photo_stream_nhl_and_more.html (visited Feb. 13, 2012).

⁷⁹⁵ See Atlantic Coast Conference, *ACC Launches Digital Network* (press release), Oct. 17, 2011 ("ACC Launches").

⁷⁹⁶ See *id.*

⁷⁹⁷ See *id.*

⁷⁹⁸ Mike Reynolds, *BTN2GO Kicks Off With Four Distributors*, MULTICHANNEL NEWS, Sept. 1, 2011, <http://www.multichannel.com/article/473187-BTN2GO-Kicks-Off-With-Four-Distributors.php> (visited Feb. 13, 2012) ("BTN2GO Kicks Off").

⁷⁹⁹ See *id.*; BTN2GO, *What is BTN2GO?*, <http://www.btn2go.com/btn2go/FAQ.jsp> (visited Feb. 13, 2012) ("BTN2Go FAQ").

⁸⁰⁰ See *id.*

⁸⁰¹ See Crackle, *About Crackle*, <http://www.crackle.com/about/> (visited Feb. 13, 2012) ("About Crackle"); Crackle, *Crackle FAQ: General Questions*, http://www.crackle.com/outreach/faq#general_questions (visited Feb. 14, 2012) ("Crackle FAQ"); Daniel Frankel, *Sony's Crackle Launches On Xbox Live*, PaidContent.org, Jan. 31, 2012, (continued....)

249. *Affiliates of Online Services.* YouTube launched in February 2005, primarily as a portal for niche, user-generated-content.⁸⁰² In its early years, much of the professional content on YouTube was posted by individual users without the permission of the relevant rights holders.⁸⁰³ Since Google purchased YouTube for \$1.65 billion in 2006,⁸⁰⁴ however, the service has evolved into a destination for a wide variety of free content, produced by both amateur and professional content creators.⁸⁰⁵ YouTube began renting movies to users in January 2012,⁸⁰⁶ and currently boasts an extensive catalog of online movie rental content.⁸⁰⁷

250. In 2011, Facebook entered the OVD market and began offering online movie rentals for a fee. In March 2011, Warner Brothers announced that “The Dark Knight” would be the first Warner Brothers movie to be made available for purchase or rental on Facebook.⁸⁰⁸ Since then, Warner Brothers has made several additional movies, as well as an original series, available via Facebook.⁸⁰⁹ In July 2011, Facebook began to offer a limited selection of movies from Paramount,⁸¹⁰ and in August 2011 the service

(Continued from previous page)

<http://paidcontent.org/article/419-sonys-crackle-launches-on-xbox-live/> (visited Feb. 14, 2012) (“Crackle on Xbox”).

⁸⁰² See, e.g., Tony Long, *Feb. 15, 2005: YouTube and Your 15 Minutes of Fame*, WIRED, Feb. 15, 2012, <http://www.wired.com/thistdayintech/2011/02/0215youtube-launched/> (visited Feb. 14, 2012) (“YouTube 15 Mins.”).

⁸⁰³ See, e.g., *id.*; Kenneth Li & Richard Waters, *YouTube “Knew of Copyright Violations,”* FINANCIAL TIMES, Mar. 19, 2010, <http://www.ft.com/cms/s/2/56cacf09-32e2-11df-a767-00144feabde0.html#axzz1j5CtASMq> (visited Feb. 14, 2012).

⁸⁰⁴ See, e.g., YouTube 15 Mins.

⁸⁰⁵ See, e.g., YouTube, *Partner Showcase*, http://www.youtube.com/t/partnerships_showcase (visited Feb. 14, 2012); NPR, *A War To Watch: YouTube Takes On Television*, Jan. 12, 2012, <http://www.npr.org/2012/01/12/145099987/a-war-to-watch-youtube-takes-on-television> (visited Feb. 14, 2012); Graeme McMillan, *YouTube Confirms New Professionally-Created Channels*, TIME, Oct. 29, 2011, <http://techland.time.com/2011/10/29/youtube-confirms-new-professionally-created-channels/> (visited Feb. 14, 2012).

⁸⁰⁶ Adam Ostrow, *YouTube Debuts Movie Rentals*, Mashable, Jan. 20, 2010, <http://mashable.com/2010/01/20/youtube-movie-rentals-2/> (visited Feb. 27, 2012).

⁸⁰⁷ YouTube, *Movies*, <http://www.youtube.com/movies> (visited Feb. 27, 2012) (“YouTube Movies”).

⁸⁰⁸ Time Warner, *Warner Bros. Entertainment Becomes First Hollywood Studio To Offer Movies Directly On Facebook* (press release), Mar. 8, 2011.

⁸⁰⁹ Emil Protalinski, *Warner Bros. Offers Five More Movies on Facebook*, ZDNet, Mar. 28, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-offers-five-more-movies-on-facebook/1003?tag=content:sui-container> (visited Feb. 14, 2012); Emil Protalinski, *Warner Bros. Announces the First Facebook Show*, ZDNet, Sept. 29, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-announces-the-first-facebook-show/4254> (visited Feb. 14, 2012); Facebook, *Aim High*, <http://www.facebook.com/AimHighSeries> (visited Feb. 14, 2012).

⁸¹⁰ Erik Gruenwedel, *Paramount Posts Entire “Jackass” Catalog on Facebook*, HOME MEDIA MAGAZINE, July 28, 2011, <http://www.homemediamagazine.com-paramount-paramount-posts-entire-jackass-catalog-facebook-24627> (visited Feb. 14, 2012); Kurt Orzeck, *Paramount Places “Mission: Impossible” for Rent on Facebook*, TheWrap.com, Nov. 22, 2011, <http://www.thewrap.com/movies/article/mission-impossible-flicks-coming-facebook-32993> (visited Feb. 14, 2012).

added movie content from Universal Studios⁸¹¹ and Miramax.⁸¹²

251. In October 2011, Yahoo launched Yahoo Screen, a revamped portal for its television shows and premium video content.⁸¹³ Yahoo Screen content includes original shows as well as content secured through licensing deals with entities, such as Hulu, CBS, ABC News, Ultimate Fighting Championship, and special interest video network Revision3.⁸¹⁴ Yahoo Screen provides “multiple channels filled with thousands of videos and television shows” and boasts an interface that looks “very similar to Hulu.”⁸¹⁵

252. *Affiliates of Manufacturers, Retailers, and Other Businesses.* A variety of other businesses also operate OVDs as well. Netflix launched in 1999 as an Internet-based DVD rental service.⁸¹⁶ In 2007, Netflix added its Watch Instantly service (originally called “Watch Now”).⁸¹⁷ Watch Instantly, a subscription service, allows consumers to stream video content to computers, mobile devices, and televisions connected to a Netflix-enabled device.⁸¹⁸ By the end of 2010, a majority of Netflix subscribers viewed more of Netflix’s television shows and movies via streaming than from its DVD rental service.⁸¹⁹

253. Similarly, Apple is a designer, manufacturer, and marketer of electronic hardware and software, with online video representing only a small portion of its revenues.⁸²⁰ In 2005, Apple

⁸¹¹ Cooper Smith, *Facebook: “The Big Lebowski” Now Available To Watch Via Social Theater App*, HUFFINGTON POST, Aug. 19, 2011, http://www.huffingtonpost.com/2011/08/19/facebook-the-big-lebowski-watch_n_931350.html (visited Feb. 14, 2012).

⁸¹² Bianca Bosker, *Miramax Brings More Movies To Facebook: A Look At The Movie Rental App*, HUFFINGTON POST, Aug. 22, 2011, http://www.huffingtonpost.com/2011/08/22/watch-movies-on-facebook-miramax-movie-rental-app_n_933058.html#s335352 (visited Feb. 14, 2012).

⁸¹³ Ben Parr, *Yahoo Launches Revamped Premium Video Portal*, Mashable, Oct. 4, 2011, <http://mashable.com/2011/10/04/yahoo-screen/> (visited Feb. 14, 2012).

⁸¹⁴ See *id.*; Revision 3, *Inside Revision3: About Us*, <http://revision3.com/about> (visited Feb. 14, 2012). Revision3 is an Internet television network that produces original content, including lifestyle and technology video shows geared to 13-34 year old males. See Andy Plesser, *Revision3 Is “Biggest” Internet TV Network With 70 Million Monthly Video Views*, Business Insider, May 19, 2011, http://articles.businessinsider.com/2011-05-19/tech/30038978_1_revision3-video-views-network (visited Feb. 27, 2012). According to figures provided by Revision3’s CEO in May 2011, the network had 17 million monthly unique viewers who watched 70 million video views. See *id.*

⁸¹⁵ Graeme McMillan, *Yahoo! Screen: Your New TV on the Internet*, TIME, Oct. 4, 2011, <http://techland.time.com/2011/10/04/yahoo-screen-your-new-tv-on-the-Internet/> (visited Feb. 14, 2012).

⁸¹⁶ Netflix, *Company Timeline*, <https://signup.netflix.com/MediaCenter/Timeline> (visited Feb. 14, 2012).

⁸¹⁷ See *id.*; Bumpershine, *Netflix “Watch Instantly” Goes Unlimited*, Dec. 17, 2007, <http://www.bumpershine.com/2007/12/17/netflix-watch-instantly-goes-unlimited.html> (visited Feb. 14, 2012).

⁸¹⁸ Netflix, *Signup*, <https://signup.netflix.com/home?country=1&rdirdf=true> (visited Feb. 14, 2012) (“Netflix Signup”); Netflix, *How It Works*, <https://signup.netflix.com/HowItWorks> (visited Feb. 14, 2012) (“Netflix How It Works”).

⁸¹⁹ See Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2010*, at 22 (“Netflix 2010 Form 10-K”).

⁸²⁰ For example, Apple’s revenue from “net sales of other music related products and services” – which includes, among other things, online video and music sales – accounted for just nine percent of the company’s 2009 net sales, eight percent of the company’s 2010 net sales, and six percent of the company’s 2011 net sales. See Apple Inc., *SEC Form 10-K for the Period Ended September 24, 2011*, at 30-32 (“Apple 2011 Form 10-K”).

announced that it would begin offering certain movies and television episodes for download on a per movie or per program fee basis.⁸²¹ In January 2008, Apple announced the introduction of its iTunes Movie Rentals service, which allows users to rent movies from all the major studios and watch them on their computers, Apple mobile devices, or Apple TV.⁸²² Consumers also can now buy television shows and movies via iTunes.⁸²³ Some analysts have noted that for Apple, providing worthwhile online video content is not merely an end in itself, but is also a tool to promote the company's digital devices.⁸²⁴

254. In 2006, online retailer Amazon.com launched its Unbox service, which allowed consumers to download television and movie content for rental or purchase, on a pay-per-download basis.⁸²⁵ Two years later, Amazon announced that consumers could stream movies and television programs on their computers, without advertisements, through its Amazon Video on Demand streaming service.⁸²⁶ In 2011, Amazon announced that customers who pay an annual fee for the company's Amazon Prime service will receive commercial-free, instant streaming of thousands of movies and television shows at no extra charge.⁸²⁷ OVD content provided by Amazon can be viewed on multiple devices.⁸²⁸

255. In addition to being a producer of content, Sony also manufactures consumer electronics equipment. As discussed in more detail below, Sony's Crackle OVD service is available on numerous devices, many of which are manufactured by Sony. Indeed, the ability to use Crackle to access Sony's library of movies, television shows, and original programming⁸²⁹ is a potential selling point for these electronics products.

⁸²¹ Apple Inc., *Apple Announces iTunes 6 With 2,000 Music Videos, Pixar Short Films & Hit TV Shows* (press release), Oct. 12, 2005.

⁸²² Apple Inc., *Apple Premieres iTunes Movie Rentals With All Major Film Studios* (press release), Jan. 15, 2008.

⁸²³ Apple, *iTunes, What's On iTunes*, <http://www.apple.com/itunes/whats-on/> (visited Feb. 14, 2012) ("What's On iTunes").

⁸²⁴ See, e.g., Geoffrey A. Fowler & Sam Schechner, *A New Digital Battlefield*, WALL ST. J., Sept. 2, 2010, http://online.wsj.com/article/SB10001424052748703431604575468051468814036.html#article_fabs%3Darticle (visited Feb. 14, 2012) ("Fowler & Schechner").

⁸²⁵ Marshall Kirkpatrick, *Amazon Unbox Goes Live*, Tech Crunch, Sept. 7, 2006, <http://techcrunch.com/2006/09/07/amazon-unbox-goes-live/> (visited Feb. 14, 2012).

⁸²⁶ See Amazon.com, *Amazon Instant Video Compatible Devices*, <http://www.amazon.com/gp/video/ontv/devices> (visited Feb. 29, 2012) ("Amazon Devices").

⁸²⁷ Amazon Devices: Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release), Feb. 22, 2011. The company's Amazon Prime service provides other, non-video benefits, including for instance two-day shipping on some purchases. See Amazon.com, *Amazon Prime*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=13819211> (visited Feb. 14, 2012) ("Amazon Prime").

⁸²⁸ See Amazon.com, *Watch Anywhere*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000663511> (visited Feb. 14, 2012); Amazon.com, *Help, Watching Amazon Instant Videos*, http://www.amazon.com/gp/help/customer/display.html?ref=hp_3757_watchfaq?nodeId=200238920 (visited Feb. 14, 2012); Amazon.com, *Help, Amazon Instant Video Support*, http://www.amazon.com/gp/help/customer/display.html?ref=hp_13819211_aiv?nodeId=3757 (visited Feb. 14, 2012).

⁸²⁹ See About Crackle: Crackle FAQ: Crackle on Xbox.

256. In 2007, Vudu launched a service that provided consumers with a television set-top box that enabled instant viewing of movies via rent or purchase.⁸³⁰ Wal-Mart purchased the company in February 2010.⁸³¹ Today, Vudu offers its movie store and interactive services as a feature that consumer electronics manufacturers can build into their devices,⁸³² many of which are available for sale at Wal-Mart.

257. Consumer electronics retailer Best Buy's CinemaNow service allows users to rent or purchase movie and television show content.⁸³³ CinemaNow, a non-subscription service, provides customers with same-day instant access to new release movies and television shows.⁸³⁴ Users can access CinemaNow content via a variety of devices, some of which can be purchased at Best Buy, including computers and certain Internet-connectable televisions and Blu-ray players.⁸³⁵

a. Horizontal Concentration and Vertical Integration

258. *Horizontal Concentration.* It is difficult to measure horizontal concentration in the OVD marketplace. To begin with, it is hard to get a handle on the number and identity of players in the market. As described in the examples above, all of the major providers in this industry segment have either entered the market, or dramatically retooled their approach to the distribution of video content, during the last few years. Players continue to enter and exit the OVD marketplace, and business models appear to be evolving.

259. Even if it were possible to get a firm handle on the players in the OVD marketplace, it is difficult to obtain the revenue or ratings/viewing information required for a horizontal concentration analysis. As discussed above, many OVDs are parts of companies with multiple non-OVD business lines. This often makes it difficult or impossible to obtain useful OVD revenue figures. As noted above, for example, Apple reports revenue from a category called "net sales of other music related products and services," which includes, among other things, online video and music sales, but does not break out what portion of that revenue comes from OVD services.⁸³⁶ Similarly, while revenues for Netflix are available, the company's most recent SEC Form 10-K filing notes that because Netflix subscribers were able to receive both streaming and DVDs-by-mail under a single hybrid plan prior to the fourth quarter of 2011,

⁸³⁰ See Brad Stone, *Wal-Mart Adds Its Clout to Movie Streaming*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/2010/02/23/technology/23video.html?partner=rss&emc=rss> (visited Feb. 15, 2012) ("Wal-Mart Clout"); Azadeh Ensha, *Vudu, Roku, Boxee: What's the Difference?*, N.Y. TIMES, Mar. 24, 2009, <http://gadgetwise.blogs.nytimes.com/2009/03/24/vudu-roku-boxee-whats-the-difference/> (visited Feb. 15, 2012); Brad Stone, *Vudu Casts Its Spell on Hollywood*, N.Y. TIMES, Apr. 29, 2007, <http://www.nytimes.com/2007/04/29/business-yourmoney/29vudu.html> (visited Feb. 15, 2012).

⁸³¹ See Wal-Mart Clout.

⁸³² See Vudu, *VUDU is Available on Virtually Every Internet-Connected Blu-ray Player and HDTV on the Market*, <http://www.vudu.com/devices.html> (visited Feb. 15, 2012) ("Vudu Devices"); Vudu, *VUDU Expands Distribution to HDTVs and Blu-ray Players from LG, Mitsubishi, Samsung, SANYO, Sharp, Toshiba and VIZIO* (press release), Jan. 8, 2010.

⁸³³ CinemaNow, *About Us*, <http://www.cinemanow.com/AboutUs-BBYCinemaNow.aspx> (visited Feb. 15, 2012) ("About CinemaNow").

⁸³⁴ See *id.*: Best Buy Co. Inc., *Best Buy Provides Customers Same-Day Instant Access to New Release Movies and TV Shows with Launch of CinemaNow* (press release), May 18, 2010.

⁸³⁵ See *id.*: About CinemaNow.

⁸³⁶ See *supra*, ¶ 253 & n. 820; Apple 2011 Form 10-K at 30-32.

it is not possible to allocate domestic revenues from prior to that time between the company's streaming and DVD rental segments.⁸³⁷

260. Moreover, while metrics exist to assess MVPD subscribership or broadcast viewership, measuring online video viewership raises unique challenges. Entities like Nielsen and comScore measure hits/views for online video websites, but they use different methodologies and, therefore, achieve different results. Importantly, services that measure online video viewership generally do not separate professional and non-professional video content. For example, entities such as Google/YouTube and Facebook rank high in analyses by comScore and Nielsen,⁸³⁸ but this is almost certainly due in large part to the non-professional video content hosted on both sites.⁸³⁹ Hence, these viewership figures cannot be used to measure horizontal concentration in the market for online delivery of professional video content.

261. *Vertical Integration.* As discussed above, many OVDs are vertically integrated. For example, some OVDs are integrated with content producers and owners, which view online video as another distribution outlet for their programming. In other cases, OVDs are affiliated with online services for which video content is an additional product to offer consumers or with retailers of consumer electronics equipment used to access OVD-delivered content.

262. In addition, OVDs, including those not affiliated with traditional programmers or content owners, are becoming increasingly involved in the creation of original content. For example, Netflix launched an original show, *Lilyhammer*, in February 2012.⁸⁴⁰ In addition, it is developing three additional original series (*House of Cards*, *Orange Is the New Black*, and *Hemlock Grove*), and plans to air exclusive new episodes of *Arrested Development* in 2013.⁸⁴¹ Hulu launched its first original series, *Battleground*, in

⁸³⁷ See Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2011*, at 26. On September 1, 2011, Netflix ended its hybrid plan, which, for \$9.99, provided unlimited access to the Netflix streaming video library and allowed customers to rent one DVD at a time. See Greg Sandoval, *Netflix Users: Time to Pick a Plan*, CNET, Aug. 29, 2011, http://news.cnet.com/8301-31001_3-20098921-261-netflix-users-time-to-pick-a-plan/ (visited Mar. 5, 2012); Eric Savitz, *Netflix Jacking Up Prices On Hybrid DVD Streaming Plans*, FORBES, July 13, 2011, <http://se.news.yahoo.com/netflix-jacking-prices-hybrid-dvd-streaming-plans-172634671.html> (visited Mar. 5, 2012). As of March 2012, Netflix customers pay \$7.99 per month for unlimited streaming and must pay an additional \$7.99 per month for the DVD rental service (\$9.99 for access to Blu-ray discs). See *id.*; Netflix Signup: Netflix How It Works. Netflix announced plans to split its DVD-rental business from its streaming business in September 2011, but reversed that decision the next month. Bianca Bosker, *Qwikster Is Dead: Netflix Kills DVD-Only Service Weeks After Unveiling It*, HUFFINGTON POST, Oct. 10, 2011, http://www.huffingtonpost.com/2011/10/10/qwikster-dead-netflix-kills_n_1003098.html (visited Mar. 5, 2012).

⁸³⁸ See *infra*, ¶¶ 320-21.

⁸³⁹ See *supra*, ¶ 249; Facebook, *Help Center: Video: Uploading and Viewing Videos*, <http://www.facebook.com/help/?page=157734877627482> (visited Feb. 16, 2012).

⁸⁴⁰ See Lesley Goldberg, *Netflix to Bow Original Series "Lilyhammer" on Feb. 6*, THE HOLLYWOOD REPORTER, Jan. 3, 2012, <http://www.hollywoodreporter.com/live-feed/netflix-bow-original-series-lilyhammer-277530> (visited Feb. 28, 2012).

⁸⁴¹ See *id.*; Chloe Albanesius, *Netflix Original Series, Lilyhammer, to Debut Feb. 6*, PC MAGAZINE, Jan. 3, 2012, <http://www.pcmag.com/article2/0,2817,2398304,00.asp> (visited Feb. 15, 2012); Janko Roettgers, *Netflix, Hulu and the Golden Age of Content*, Gigaom, Jan. 16, 2012, <http://gigaom.com/video/netflix-hulu-exclusive-content/> (visited Feb. 15, 2012) ("Golden Age"). Netflix paid \$100 million, outbidding cable networks, for rights to air 26 episodes of original series *House of Cards*. Paul Bond, *Hollywood's Feelings About Netflix's \$100 Million "House of Cards" Deal*, THE HOLLYWOOD REPORTER, Mar. 23, 2011, <http://www.hollywoodreporter.com/news/hollywoods-feelings-netflixs-100-million-170651> (visited Feb. 28, 2012). According to recent industry reports, CBS has held discussions with Netflix about producing original programming for airing on Netflix as well. See COMM. DAILY (Feb. 17, 2012) at 16-17.

February 2012.⁸⁴² Similarly, in late 2011, Yahoo announced eight original shows targeted at women and featuring Hollywood talent.⁸⁴³ YouTube continues to invest in original content, offering multiple channels from Hollywood celebrities and other content partners.⁸⁴⁴

b. Entry and Exit Conditions

263. Some commenters state that the online video marketplace is relatively open with low barriers to entry.⁸⁴⁵ OVDs generally rely on third-party owned infrastructure for data transport, instead of needing to build their own.⁸⁴⁶ On the other hand, one industry analyst states, “there are huge and very real infrastructure costs associated with massive server farms, transport costs, and hosting fees associated with a large-scale video-over-the Internet model. . . . For a large scale start-up, the cost could run into the billions.”⁸⁴⁷ Moreover, while niche material often can find an audience, in order to compete, an OVD must secure rights to a wide range of compelling content, which can be difficult and quite expensive.⁸⁴⁸ While the extent of these costs will vary depending on an OVD’s business model, it is clear that there are real costs and hurdles involved in entering into, and competing in, the OVD market.

264. Below, we discuss the regulatory conditions potentially affecting entry in this market. Thereafter, we describe the market, or non-regulatory, conditions that may influence entry decisions, including the need for OVDs to acquire rights to content and to secure sufficient, reasonably priced Internet access for transmission of OVD content. We then describe recent entry and exit from the market.

(i) Regulatory Conditions

265. *Open Internet.* OVDs need broadband Internet speeds and capacity in order to transmit video content to their customers. In 2010, the Commission adopted an order seeking to protect the openness of the Internet.⁸⁴⁹ The Commission’s open Internet rules require transparency from fixed and

⁸⁴² See Golden Age: Meg James, *Hulu Introduces “Battleground,” its First Original Scripted Show*, L.A. TIMES, Jan. 15, 2012, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/hulu-introduces-battleground-first-original-scripted-show.html> (visited Feb. 15, 2012).

⁸⁴³ Georg Szalai: *Yahoo Launches Original Web Shows Targeting Women With Judy Greer, Morgan Spurlock, Niecy Nash*, THE HOLLYWOOD REPORTER, Oct. 4, 2011, <http://www.hollywoodreporter.com/news/yahoo-launches-original-web-shows-243610> (visited Feb. 15, 2012).

⁸⁴⁴ See Golden Age: Ben Sisario, *New Layer of Content Amid Chaos on YouTube*, N. Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/technology/youtube-channels-seek-advertisers-and-audiences.html?pagewanted=all> (visited Mar. 12, 2012); Janko Roettgers, *It’s True: YouTube to Take on Cable With A-list Celebs*, Gigaom, Oct. 28, 2011, <http://gigaom.com/video/youtube-premium-content> (visited Feb. 15, 2012); See also *infra*, ¶¶ 304-05.

⁸⁴⁵ See, e.g., Google 6/8/11 Comments at 1-4.

⁸⁴⁶ See *infra*, ¶¶ 271-75.

⁸⁴⁷ See Craig Moffett, *Weekend Media Blast: Why Haven’t We Seen a Virtual MSO Yet?*, Bernstein Research, Jan. 27, 2012, at 3 (“Virtual MSO”).

⁸⁴⁸ See *Comcast-NBCU Order*, 26 FCC Red at 4273, ¶ 86; *infra*, ¶¶ 268-70, ¶¶ 287-89.

⁸⁴⁹ See *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Red 17905, 17906, ¶ 1 (2010) (“*Open Internet Order*”). This order is currently on appeal in the D.C. Circuit. See, e.g., Notice of Appeal, *Verizon v. FCC*, No. 11-1355 (filed Sept. 30, 2011, D.C. Cir.). In addition, Southern Company Services recently filed a petition for clarification or reconsideration with the Commission concerning one aspect of the *Open Internet Order*. See Southern Company Services, Petition for Clarification or Reconsideration, GN Docket No. 09-191, WC Docket No. 07-52 (filed Oct. 24, 2011).

mobile broadband providers.⁸⁵⁰ In addition, fixed broadband providers cannot block access to lawful content, applications, and services; mobile broadband providers cannot block access to lawful websites and applications competing with their voice or video telephony services.⁸⁵¹ Fixed broadband providers must also allow access to non-harmful devices and cannot unreasonably discriminate in transmitting lawful network traffic.⁸⁵²

266. *Closed Captioning.* In January 2012, the Commission adopted rules placing closed captioning obligations on the owners, providers, and distributors of video programming delivered using Internet protocol (IP).⁸⁵³ The rules were adopted pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which directed the Commission to revise its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations.⁸⁵⁴ An entity intending to enter the OVD marketplace will need to take steps to comply with these requirements.

(ii) Non-regulatory Conditions

267. An OVD entrant faces several non-regulatory costs and challenges to introducing its video content services that influence its decision to enter the market, including program acquisition and the need for sufficient Internet capacity at a reasonable cost.

268. *Program Acquisition.* Just as OVD subscriber growth creates the ability to obtain more content, which in turn drives usage and subscriber growth, lack of compelling content to offer potential customers is a significant deterrent to entry. An entity attempting to enter the OVD marketplace must obtain a robust, if not comprehensive, programming library to offer consumers.⁸⁵⁵

269. One potential barrier to such content acquisition is cost. For example, Netflix recently signed a deal with The CW network, which gives Netflix the streaming rights to repeats of current and future The CW network series. While the cost is undisclosed, and reportedly depends on the performance of certain shows, analysts estimate that it is close to \$1 billion, including approximately \$600,000 an episode for established shows like *Gossip Girl*.⁸⁵⁶ This is a significant cost for what will amount to a

⁸⁵⁰ See *Open Internet Order*, 25 FCC Red at 17906, ¶ 1.

⁸⁵¹ See *id.*

⁸⁵² See *id.*

⁸⁵³ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Red 787 (2012). Petitions for reconsideration are currently pending before the Commission.

⁸⁵⁴ 47 U.S.C. § 613(c)(2).

⁸⁵⁵ See *Comcast-NBCU Order*, 26 FCC Red at 4273, ¶ 86 (“If an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming.”); Will Richmond, *This Holiday Season, Video Apps’ Purpose is to Sell Devices*, VideoNuz, Nov. 10, 2011, <http://www.videonuze.com/article/this-holiday-season-video-apps-purpose-is-to-sell-devices> (visited Feb. 15, 2012) (“In short, premium video is more valuable than ever, with new players in the ecosystem recognizing that they can’t accomplish their goals without it. Another reminder that content is king.”); Dan Rayburn, *Veoh Should Be A Reminder That Execution & Focus Are More Important Than Vision*, StreamingMediaBlog.com, Feb. 12, 2010, http://blog.streamingmedia.com/the_business_of_online_vi/2010/02/veoh-should-be-a-reminder-that-execution-and-focus-are-more-important-than-vision.html (visited Feb. 15, 2012) (discussing demise of OVD Veoh and noting that it is difficult for an ad-supported OVD to survive without a broad content library).

⁸⁵⁶ Joe Flint & Ben Fritz, *Netflix Deal Makes CW Pay Off for CBS and Warner Bros.*, L.A. TIMES, Oct. 13, 2011, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/10/netflix-cw-deal-cbs-warner-bros.html> (visited Feb. 15, 2012) (“Netflix CW Deal”).

small part of Netflix's overall content library. Alternatively, Microsoft put its plans to start an online subscription service for television shows and movies on hold after determining that constant licensing costs would be too high for the company's envisioned business model.⁸⁵⁷ Given the costs faced by established companies, it is even more difficult for new entrants with less capital to enter into the many high-priced content deals required to build an adequate content library.

270. Content acquisition difficulties for OVDs can be exacerbated by vertical integration and pre-existing business relationships in the marketplace. For example, vertical integration or exclusivity arrangements between content producers/owners and cable networks, broadcast networks, or MVPDs can make it difficult for unaffiliated OVDs to obtain content rights.⁸⁵⁸ OVD content acquisition also can be difficult when content owners are vertically integrated with, or enjoy exclusive relationships with, other OVDs.⁸⁵⁹

271. *Internet Capacity and Cost.* Unlike MVPDs such as cable and DBS, which generally own and/or control the infrastructure they use to distribute video content to their customers, as stated above, OVDs rely on high-capacity and high-speed broadband Internet services that are often owned and controlled by unaffiliated MVPDs.⁸⁶⁰ According to one analyst, services and applications such as OVD services represented 60 percent of peak downstream traffic in 2011, with Netflix alone accounting for 32.7 percent of such traffic.⁸⁶¹ OVDs therefore must have access to sufficient, reliable, and reasonably priced broadband capacity in order to operate in the video marketplace. Prospective OVD entrants face several challenges in this regard.

272. First, consumers may lack the broadband capability that is a necessary prerequisite for OVD providers to reach their intended market. Broadband deployment has increased in recent years, but, as the Commission has repeatedly recognized, it is far from ubiquitous. The Commission recently estimated that 26.2 million Americans living in more than 9.2 million households do not have access to

⁸⁵⁷ Yinka Adegoke, *Exclusive: Microsoft Web TV Subscription Plan on Hold*, Reuters, Jan. 11, 2012, <http://www.reuters.com/article/2012/01/11/us-microsoft-video-idUSTRE80A1KL20120111> (visited Feb. 15, 2012).

⁸⁵⁸ See, e.g., Netflix 2010 Form 10-K, at 7 (noting that HBO's license with Warner Brothers provides HBO with the exclusive right to such content against other subscription services, including OVDs like Netflix); *Comcast-NBCU Order* 26 FCC Red at 4273, ¶ 86 & 4359-62, Online Conditions IV.A-IV.C (listing Commission-imposed conditions designed to prevent Comcast/NBCU from withholding online rights to programming from unaffiliated OVDs); Rural Associations 6/8/11 Comments at 9; Netflix 6/8/11 Comments at 6-7.

⁸⁵⁹ See, e.g., *The Economics of Online Video* (White Paper), ADVERTISING AGE, June 19, 2010, at 10 ("AD AGE White Paper"); Emma Barnett, *Joost ex-CEO Holds Broadcasters Responsible for Demise of Company*, THE TELEGRAPH, July 7, 2009, <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/5771174/Joost-ex-CEO-blames-broadcasters-for-demise-of-company.html> (visited Feb. 15, 2012) (discussing belief of former CEO of OVD Joost that broadcasters' decision to create their own online video services hindered Joost's ability to acquire the content rights necessary to be competitive).

⁸⁶⁰ See Rovi 6/8/11 Comments at 2. The record indicates that cable operators continue to invest billions of dollars in infrastructure and facility rebuilds and upgrades to improve their video service offerings, as well as to offer more robust Internet and digital telephone services. Since 1996, cable companies have invested over \$170 billion in infrastructure, including \$12 billion in 2010 alone. See NCTA 6/8/11 Comments at 9-10. Telephone companies, including those that are not MVPDs, also provide the broadband Internet services that OVDs require.

⁸⁶¹ Sandvine, *Global Internet Phenomena Report*, Fall 2011 at 2, 5-8. The analyst defined peak period as the time during which aggregate network traffic is within 95 percent of its highest value. *Id.* at 5.

broadband service at or above the Commission's 4 Mbps downstream/1 Mbps upstream broadband speed benchmark.⁸⁶²

273. Second, even where the physical capacity exists to provide broadband service, some of the leading Internet Service Providers ("ISPs") have begun to impose data caps or shift to usage-based billing. Specifically, in 2008 Comcast imposed a data cap of 250 gigabytes per month, disconnecting users who exceeded the cap twice in a six-month period.⁸⁶³ In May 2011, AT&T imposed a cap of 150 GB per month for its DSL service and 250 GB for its U-verse service; if a user exceeds the data limit AT&T will send certain notifications, and then charge an additional \$10 per month for each 50 GB beyond the limit.⁸⁶⁴ Cox imposes monthly usage limits from 30 GB up to 400 GB, depending on the package.⁸⁶⁵ Major wireless providers also have begun to impose data caps.⁸⁶⁶ Broadband providers assert that data caps and usage based billing are mechanisms to manage ISP traffic, address excessive use, alleviate network congestion, ensure that users can access their networks, and provide adequate data speeds to all of their customers.⁸⁶⁷ Some commenters identify moves by broadband ISPs to usage-based billing as being potentially discriminatory against OVDs,⁸⁶⁸ and some claim that this behavior is intended to retard OVD growth to sustain the traditional MVPD subscription model.⁸⁶⁹ In contrast, ISPs indicate

⁸⁶² See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Red 8008, 8018, 8022, ¶¶ 14, 23 (2011). The Commission is in the process of reforming and modernizing its Form 477 data collection in order to obtain more accurate information about broadband deployment. See *id.* at 8016, ¶ 11; see generally *Modernizing the FCC Form 477 Data Program; Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership; Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Review of Wireline Competition Bureau Data Practices*, WC Docket Nos. 07-38, 08-190, 01-132, and 11-10, Notice of Proposed Rulemaking, 26 FCC Red 1508 (2011).

⁸⁶³ Editorial, *To Cap, or Not*, N.Y. TIMES, July 21, 2011, <http://www.nytimes.com/2011/07/22/opinion/22fri2.html> (visited Feb. 17, 2012) ("To Cap or Not"); Chloe Albanesius, *Comcast to Cap Data Transfers at 250 GB in Oct.*, PC MAGAZINE, July 22, 2011, <http://www.pcmag.com/article2/0,2817,2329170,00.asp> (visited Feb. 17, 2012) ("Comcast to Cap").

⁸⁶⁴ See AT&T, *High Speed Internet Support: Broadband Usage FAQs*, <http://www.att.com/esupport/article.jsp?sid=KB409045&cv=801&ct=9000106&pv=3&title=Broadband+Usage+FAQs#fbid=xw2lZ1J5WmM> (visited Feb. 17, 2012) ("AT&T Broadband Usage").

⁸⁶⁵ See Cox, e.g., *Speeds and Allowances Information for High Speed Internet Service in Rhode Island*, <http://ww2.cox.com/aboutus/rhodeisland/policies/speedsusage.cox> (visited Feb. 17, 2012).

⁸⁶⁶ See, e.g., AT&T, *An Update for Our Smartphone Customers With Unlimited Data Plans* (press release), July 29, 2011 (announcing reduction in speeds for smartphone customers with unlimited data plans who exceed certain bandwidth thresholds) ("Smartphone Update"); Julianne Pepitone, *AT&T Raises Limit for Smartphone Data Slowdown*, CNNMoney, Mar. 1, 2012, http://money.cnn.com/2012/03/01/technology/att_data_slowdown/index.htm?hpt_hp_t2 (visited Mar. 2, 2012) ("Smartphone Data Slowdown"); Trefis Team, *Crowded Pipes Prompt Verizon To Nix Unlimited Data Plans*, FORBES, May 31, 2011, <http://www.forbes.com/sites/greatspeculations/2011/05/31/crowded-pipes-prompt-verizon-to-nix-unlimited-data-plans/> (visited Feb. 17, 2012).

⁸⁶⁷ See, e.g., *To Cap, or Not; Comcast to Cap; AT&T Broadband Usage; Smartphone Update; Smartphone Data Slowdown*; Chloe Albanesius, *Comcast Weighs 250 GB Month Download Limit*, PC MAGAZINE, May 8, 2008, <http://www.pcmag.com/article2/0,2817,2301203,00.asp> (visited July 16, 2012).

⁸⁶⁸ See, e.g., NetfliX 6/8/11 Comments at 8; Public Knowledge 6/8/11 Comments at 4-5, 9-10.

⁸⁶⁹ See e.g., WGAW 6/8/11 Comments at 19.

they have not impeded the growth of OVDs. By continually upgrading their broadband facilities, ISPs argue that they have helped facilitate the growth of high-quality Internet video and its distribution by entities like Netflix.⁸⁷⁰ Comcast also notes that it offers a variety of speed tiers at different price points to accommodate the varying needs of its subscribers.⁸⁷¹

274. Third, MVPDs have the ability and incentive to degrade the broadband service available to unaffiliated OVDs. For example, one party states that a cable provider can constrain broadband capacity available to OVDs in order to prevent them from offering full competitive substitutes for the cable company's MVPD offerings.⁸⁷² Although the Commission's *Open Internet Order* prohibits broadband ISPs from blocking OVD traffic, some worry that exceptions for "reasonable network management" and "specialized services" may still allow MVPDs to have an undue negative impact on online video.⁸⁷³ Several MVPDs counter, however, that cable operators and other MVPDs have continually enabled the development of online video by providing faster broadband speeds and higher-bandwidth services.⁸⁷⁴

275. Finally, costs charged by ISPs to deliver online video traffic could have a negative impact on the ability of OVDs to enter the market and compete. Netflix, for example, asserts that some fees charged by MVPD/broadband network operators to terminate unaffiliated traffic on their networks can increase OVD operating costs.⁸⁷⁵ Netflix also points to a recent dispute between Comcast and Level 3 in support of its allegations that providers of MVPD service have the incentive to use traffic charges to hinder or disrupt the flow of unaffiliated broadband video services over their networks.⁸⁷⁶ MVPDs that are also ISPs dispute such assertions, arguing that while Internet backbone providers that have entered into peering arrangements typically do not charge fees when the traffic they carry for each other is roughly equal, charges are justified when the relative traffic flows are significantly out of proportion.⁸⁷⁷

⁸⁷⁰ See e.g., NCTA 7/8/11 Reply at 2-3.

⁸⁷¹ See Comcast 6/8/11 Comments at 15. Comcast highlights the need for providing a range of speed tiers by stating that 23 percent of its residential high-speed Internet customers subscribe to higher-speed tiers (i.e., speeds above 16 Mbps). See *id.* at 16.

⁸⁷² See Earthlink Reply, MB 10-56, at 9 (filed Aug. 19, 2010).

⁸⁷³ See Public Knowledge 6/8/11 Comments at 4; Rovi 6/8/11 Comments at 3. When approving the Comcast/NBCU transaction, the merged entity agreed to some voluntary commitments, and the Commission imposed conditions, designed to limit the ability of the joint venture to hinder OVD competition by restricting access to or raising the price of unaffiliated OVD content, or blocking, degrading, or otherwise violating Open Internet principles with respect to the delivery of unaffiliated online content. See, e.g., *Comcast-NBCU Order*, 26 FCC Rcd at 4263, 4274-76, 4355-64, ¶ 61, ¶¶ 91-95, App. A, §§ I-IV.

⁸⁷⁴ See, e.g., Comcast 6/8/11 Comments at 5; NCTA 6/8/11 Comments at 5.

⁸⁷⁵ Netflix 6/8/11 Comments at 7. See also Netflix 2010 Form 10-K at 12 (noting that changes in how ISPs charge for access to data on their networks might adversely affect Netflix's business). Netflix states that the ISPs' customers already pay the ISPs to deliver the bits on their network, and requiring Netflix to pay as well, even though Netflix delivers the bits in question at the request of the ISPs' customers, is an inappropriate reflection of their last mile exclusive control of their residential customers. See Letter from Reed Hastings, CEO of Netflix, to Chairman Fred Upton and Ranking Member Henry A. Waxman, Committee on Energy and Commerce, Apr. 6, 2011, at 1 (attached to Letter from Devendra T. Kumar, Attorney for Netflix, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed May 10, 2011)).

⁸⁷⁶ See Netflix 6/8/11 Comments at 1-2, 7.

⁸⁷⁷ See, e.g., Virtual MSO at 3; Spencer E. Ante & Amy Schatz, *Web-Traffic Spat Over Netflix Highlights New Tensions*, WALL ST. J., Nov. 30, 2010, <http://online.wsj.com/article/SB10001424052748704679204575646840288688392.html> (visited Feb. 17, 2012); (continued....)

c. Recent Entry and Exit

276. The OVD market has undergone dramatic transformation since the last report, as all of the major providers have either entered the market in the last few years or dramatically retooled their approach to the online distribution of video content in that time. On the other hand, since the OVD marketplace is still evolving, it is not surprising that several entities have exited the marketplace recently as well.

277. *Entry.* While YouTube has been a leading distributor of user-generated video content since it began in 2005, it has taken several steps in the last few years to evolve into an entity that offers both professional and non-professional content. YouTube implemented its “Content ID” – an advanced set of copyright policies and content management tools – in 2009, addressing in large part issues of copyright infringement that previously arose from user-uploads of third-party content and allowing media companies to monetize and manage user-uploaded videos.⁸⁷⁸ YouTube also has entered into partnerships with numerous content providers to create ad-supported channels of short- and long-form programming,⁸⁷⁹ and developed mechanisms to allow its partners to sell advertisements on YouTube more directly.⁸⁸⁰

278. Sony’s Crackle service is another example of recent entry and retooling by an OVD. In 2006, Sony bought Grouper, a website that hosted user-generated videos.⁸⁸¹ Sony shut down Grouper and relaunched it as Crackle the next year.⁸⁸² At that time, Crackle was “something of a filmmaking incubator.”⁸⁸³ User-uploaded videos were entered into contests and judged by editors.⁸⁸⁴ Crackle’s focus has since changed, however. Today, Crackle is an outlet for the distribution of professionally produced

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Nancy Gohring, *FCC Looks Into Level 3, Comcast Content Dispute*, PC WORLD, Nov. 30, 2010, http://www.pcworld.com/businesscenter/article/212078/fcc_looks_into_level_3_comcast_content_dispute.html (visited Feb. 17, 2012); Joe Mullin, *Verizon Chooses Sides, While Level 3 Keeps Fighting With Comcast*, PaidContent.org, Jan. 14, 2011, <http://paidcontent.org/article/419-verizon-chooses-sides-while-level-3-keeps-fighting-with-comcast/> (visited Feb. 29, 2012).

⁸⁷⁸ See YouTube, *Content ID*, <http://www.youtube.com/t/contentid> (visited Feb. 16, 2012); Will Richmond, *Why Did Online Video Consumption Spike in 2009?*, Video Nuzé, Feb. 24, 2010, <http://videonuze.com/blogs/?2010-02-24-Why-Did-Online-Video-Consumption-Spike-in-2009-/?id=2446> (visited Feb. 16, 2012).

⁸⁷⁹ Ryan Nakashima, *YouTube Launching 100 New Channels*, USA TODAY, Oct. 29, 2011, <http://www.usatoday.com/tech/news/story/2011-10-29/youtube-original-programming-50997002/1> (visited Feb. 16, 2012); Laura Lee, *Welcome to YouTube, Univision!*, YouTube Biz Blog, Nov. 16, 2009, <http://ytbizblog.blogspot.com/2009/11/welcome-to-youtube-univision.html> (visited Feb. 16, 2012); Diane Pucin, *ESPN and YouTube, Together*, L.A. TIMES, July 13, 2009, http://latimesblogs.latimes.com/sports_blog/2009/07/espn-and-youtube-together.html (visited Feb. 16, 2012).

⁸⁸⁰ Phil Farhi, *Helping Partners Help Themselves*, YouTube Biz Blog, July 27, 2009, <http://ytbizblog.blogspot.com/2009/07/helping-partners-help-themselves.html> (visited Feb. 16, 2012).

⁸⁸¹ Greg Sandoval, *Sony Gets Into Video Sharing with Grouper Hug*, CNET, Aug. 23, 2006, http://news.cnet.com/Sony-gets-into-video-sharing-with-Grouper-hug/2100-1026_3-6108508.html (visited Feb. 16, 2012).

⁸⁸² See Nilay Patel, *Sony Kills Grouper: Say Hello to Crackle*, Engadget, July 16, 2007, <http://www.engadget.com/2007/07/16/sony-kills-grouper-say-hello-to-crackle/> (visited Feb. 16, 2012).

⁸⁸³ See *id.*

⁸⁸⁴ See *id.*

content, such as Sony's television shows and movies, and generally does not accept user video submissions.⁸⁸⁵

279. As noted above, Hulu initiated service in 2007. Its entry into the subscription video service business was more recent however. Specifically, Hulu launched Hulu Plus in June 2010, altering its approach to delivery of online video content to consumers. The service launched as a means for Hulu's media owners to generate new sources of revenue from Hulu without undercutting the cable contracts that have traditionally supported content creation.⁸⁸⁶

280. Providers of niche content have entered the marketplace as well. For example, Mubi, a subscription OVD founded in 2007 and devoted to international, independent, and classic films, now has 1.2 million members worldwide.⁸⁸⁷ Similarly, Fandor, which focuses on independent films, launched on March 8, 2011, charging \$10 per month for access to its large library of films.⁸⁸⁸ Fandor claims that it intends to make the service accessible via multiple devices, such as smartphones, tablets, and televisions.⁸⁸⁹

281. Other competitors are entering the OVD industry as well. In February 2012, for example, Verizon announced a joint venture with Redbox operator Coinstar to launch an online streaming video service in the second half of 2012.⁸⁹⁰ Verizon operates an MVPD service (FiOS TV).⁸⁹¹ RedBox is a video rental kiosk company.⁸⁹² According to reports, the joint venture's service, called "Project Zoetrope," will allow users to subscribe to, download and stream movies and television shows across various devices, including televisions, web browsers, tablets, smartphones, Roku, Xbox and Google TV.⁸⁹³

282. In addition, the continued development of online video distribution is encouraging some established content owners to enter the video content market for the first time. For example, news entities

⁸⁸⁵ Crackle, *Crackle FAQ: The Leftovers*, <http://www.crackle.com/outreach/faq#leftovers> (visited Feb. 14, 2012).

⁸⁸⁶ Dawn C. Chmielewski, *Hulu Launches a Preview of its Subscription Service*, L.A. TIMES, June 29, 2010, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/hulu-announces-the-launch-of-its-paid-subscription-service.html> (visited Feb. 16, 2012).

⁸⁸⁷ Mubi, <http://mubi.com/> (visited Feb. 16, 2012); Mubi, *Mubi Press*, <http://mubi.com/about/press> (visited Feb. 16, 2012); Paul Bond & Tim Appelo, *How the Assault on Netflix Will Shake Out*, THE HOLLYWOOD REPORTER, Mar. 17, 2011, <http://www.hollywoodreporter.com/news/how-assault-netflix-will-shake-168562> (visited Feb. 16, 2012).

⁸⁸⁸ Fandor, <http://www.fandor.com/> (visited Feb. 16, 2012); Fandor, *About*, <http://www.fandor.com/company/about> (visited Feb. 16, 2012) ("About Fandor"); Mark Hachman, *Fandor Launches As "Netflix for Indie Films"*, PC MAGAZINE, Mar. 9, 2011, <http://www.pcmag.com/article2/0,2817,2381725,00.asp> (visited Feb. 16, 2012).

⁸⁸⁹ About Fandor.

⁸⁹⁰ David Goldman, *Verizon and Redbox Team Up to Battle Netflix*, CNN Money, Feb. 6, 2012, http://money.cnn.com/2012/02/06/technology/verizon_redbox/index.htm (visited Feb. 28, 2012) ("Verizon and Redbox Team Up"); Verizon, *Verizon and Coinstar's Redbox Form Joint Venture to Create New Consumer Choice for Video Entertainment* (news release), Feb. 6, 2012, <http://newscenter.verizon.com/press-releases/verizon-2012/verizon-and-coinstars-redbox.html> (visited Feb. 28, 2012). Verizon and Redbox hold, respectively, 65 and 35 percent ownership shares of the joint venture. *Id.*

⁸⁹¹ See *supra*, ¶ 32.

⁸⁹² See *infra*, ¶ 288.

⁸⁹³ Todd Haselton, *Verizon and Redbox May be Plotting Movie Streaming Partnership for Early 2012*, BGR.com, Dec. 9, 2011, <http://www.bgr.com/2011/12/09/verizon-and-redbox-plotting-streaming-partnership-early-2012-launch-expected/> (visited Feb. 28, 2012); Verizon and Redbox Team Up.

and organizations like *Politico*, *The Wall Street Journal*, *The Washington Post*, *The Los Angeles Times*, *The Huffington Post*, and Reuters have either entered the OVD marketplace recently or intend to do so in the near future.⁸⁹⁴ For example, *Politico* recently added to its newsroom “a stage set with lights, microphones, an anchor desk and five high-definition cameras so that reporters and editors can produce hours of live programming for Internet viewers.”⁸⁹⁵ *The New York Times* produces a daily taped news show for Internet distribution, *TimesCast*, and in early 2012 added a morning business newscast.⁸⁹⁶ *The Wall Street Journal* produces five hours of live Internet video content per day, and news organizations like *The Washington Post*, *The Los Angeles Times*, and *The Huffington Post* are preparing to provide Internet video content in the near future.⁸⁹⁷ News organizations continue to struggle to adopt new digital business models, and the potential to generate significant advertising revenue is encouraging them to develop and expand online video offerings.⁸⁹⁸

283. *Exit.* Because the OVD marketplace is still developing, it is likely that several entities will exit the marketplace in the upcoming years. MeeVee is one example of a company that entered the OVD marketplace, found it difficult to compete, and, ultimately ceased service. When MeeVee launched in 2005, it claimed to be “the first online destination to bring together traditional television listings and online video from hundreds of sources.”⁸⁹⁹ MeeVee functioned like a highly interactive program guide. A user could enter information concerning the cable and other video services to which he or she subscribed, and MeeVee would sort the user’s various viewing options.⁹⁰⁰ MeeVee also provided users with personalized viewing recommendations based on their selected shows and allowed users to create channels based on their own interests.⁹⁰¹ Through deals with content companies, MeeVee allowed users to watch previews and clips from shows.⁹⁰² The service attracted a large amount of venture capital.⁹⁰³ As of July 2007, MeeVee’s website attracted 3.4 million unique visitors per month, although it had begun losing customers by that time.⁹⁰⁴ By the end of Summer 2007, MeeVee’s traffic had experienced a steep

⁸⁹⁴ Brian Stelter, *Print News Media Go Live With Video Programming*, N.Y. TIMES, February 5, 2012, http://www.nytimes.com/2012/02/06/business/media/news-organizations-plunge-into-video-production.html?_r=1 (visited Feb. 14, 2012) (“Print Media Go Live”).

⁸⁹⁵ *See id.*

⁸⁹⁶ *See id.*; New York Times, *TimesCast*, <http://video.nytimes.com/video/playlist/timescast/1247467375115/index.html> (visited Mar. 5, 2012).

⁸⁹⁷ *See* Wall Street Journal, *Video Center*, <http://online.wsj.com/video-center> (visited Mar. 5, 2012); Print Media Go Live.

⁸⁹⁸ *See id.*

⁸⁹⁹ Clayton Moulynox, *MeeVee Internet TV Guide: Striving to Connect Broadcast & Web TV*, Web TV Wire, July 31, 2007, <http://www.webtvwire.com/meevee-to-become-tv-guide-for-the-Internet/> (visited Feb. 16, 2012).

⁹⁰⁰ Matt Marshall, *MeeVee Wants to be Your TV Guide: Raises \$8 Million More*, SiliconBeat, Aug. 14, 2006, <http://www.siliconbeat.com/entries/2006/08/14/meevee-wants-to-be-your-tv-guide-raises-8-million-more.html> (visited Feb. 16, 2012) (“MeeVee 8 Million”).

⁹⁰¹ Whitney Reynolds, *2007 Top 100 Undiscovered Web Sites*, Number 22, PC MAGAZINE, http://www.pcmag.com/slideshow_viewer/0,3253,1%253D213934%2526a%253D213919%2526po%253D22,00.asp?p=n (visited Feb. 16, 2012).

⁹⁰² Mark Hopkins, *MeeVee Lays Off 3-4 of Staff: CEO and CTO Step Down*, Mashable, Feb. 29, 2008, <http://mashable.com/2008/02/29/meevee-layoff/> (visited Feb. 16, 2012) (“MeeVee Layoff”).

⁹⁰³ *Id.*; MeeVee 8 Million.

⁹⁰⁴ *Id.*; MeeVee Layoff; Liz Gannes, *MeeVee in Tatters, Drops Staff and CEO*, New Tee Vee, Mar. 3, 2008, <http://gigaom.com/video/meevee-in-tatters-drops-staff-and-ceo/> (visited Feb. 16, 2012) (“MeeVee in Tatters”).

decline, and those numbers remained low.⁹⁰⁵ In February 2008, the company's CEO and CTO resigned, and a large portion of MeeVee's staff was laid off.⁹⁰⁶ MeeVee was purchased by Live Universe in May 2008⁹⁰⁷ but ultimately ceased operations in December 2011.⁹⁰⁸

284. Sezmi – which provided a hybrid of over-the-air, cable, and online video services⁹⁰⁹ – also exited the market recently. The service used a consumer-purchased set-top box with an Internet connection and DVR functionality and a modular DTV antenna to provide access to broadcast stations, cable networks, and Internet content.⁹¹⁰ Sezmi's antenna picked up local digital television broadcast stations off the air, and the service used digital television spectrum leased from local broadcasters, as well as the Internet, to transmit cable networks to subscribers.⁹¹¹ Sezmi's broadband connection also allowed the service to provide on-demand services (e.g., rentals and sales from an extensive library of movies and television shows), as well as access to archived video and Internet content from providers like YouTube and Comedy Central.⁹¹² Sezmi offered very effective content selection. Its set-top box learned customers' content preferences and downloaded programming automatically.⁹¹³ The service provided individualized recommendations,⁹¹⁴ and customers could set up different accounts for different individuals, so that one member of the household did not have to wade through content chosen for someone else.⁹¹⁵ Sezmi never really caught on, however, for many reasons, including a lack of compelling content compared to its rivals.⁹¹⁶ For example, Sezmi offered limited sports content (ESPN

⁹⁰⁵ See MeeVee Layoff.

⁹⁰⁶ See MeeVee in Latters: MeeVee Layoff.

⁹⁰⁷ Michael Arrington, *MeeVee Finds A Home, Acquired By Live Universe*, Tech Crunch, May 7, 2008, <http://techcrunch.com/2008/05/07/meevee-acquired-by-live-universe/> (visited Feb. 16, 2012).

⁹⁰⁸ Wendy Boswell, *Use MeeVee to Find Local TV Listings*, About.com, <http://websearch.about.com/od/dailywebsearchtips/qt/dn0812.htm> (visited Feb. 16, 2012).

⁹⁰⁹ See Eric R. Taub, *Sezmi Looks to Bring Broadcast TV to Broadband*, N.Y. TIMES, June 24, 2009, <http://gadgetwise.blogs.nytimes.com/2009/06/24/will-sezmi-say-it-to-you/> (visited Mar. 5, 2012) ("Sezmi Broadband"); Jon Healy, *How Sezmi Stacks Up*, L.A. TIMES, May 28, 2010, <http://latimesblogs.latimes.com/technology/2010/05/how-sezmi-stacks-up.html> (visited Mar. 5, 2012) ("How Sezmi Stacks Up").

⁹¹⁰ See *id.*; Harry McCracken, *Is Sezmi a Cable TV Killer?*, Technologizer, Nov. 16, 2009, <http://technologizer.com/2009/11/16/sezmi/> (visited Mar. 5, 2012) ("Sezmi Cable Killer").

⁹¹¹ See *id.*; Sezmi Broadband.

⁹¹² See Sezmi Cable Killer: Mark Hachman, *New Sezmi Set-top Blows Away the TV*, PC MAGAZINE, May 1, 2008, <http://www.pcmag.com/article2/0,2817,2289653,00.asp> (visited Mar. 5, 2012) ("Sezmi Blows Away").

⁹¹³ See Sezmi Broadband.

⁹¹⁴ See Sezmi Blows Away.

⁹¹⁵ See Sezmi Broadband.

⁹¹⁶ See Richard Lawler, *Sezmi's Cable/Satellite Alternative TV Service to Shut Down Monday, Won't Be Missed*, Engadget, Sept. 24, 2011, <http://www.engadget.com/2011/09/24/sezmi-s-cable-satellite-alternative-tv-service-to-shut-down-mo/> (visited Mar. 5, 2012) ("Sezmi to Shut Down"); Ryan Lawler, *Sezmi Says Goodbye, Here's Why*, Gigaom, Sept. 26, 2011, <http://gigaom.com/video/sezmi-says-goodbye-heres-why/> (visited Mar. 5, 2012) ("Sezmi Says Goodbye").

and regional sports networks were unavailable),⁹¹⁷ and did not provide access to OVD content from Hulu or Netflix.⁹¹⁸ Ultimately, Sezmi abandoned its consumer OVD service in September 2011.⁹¹⁹

3. OVD Conduct

285. In addition to industry structure, a second key element of our analysis of OVD competition is an examination of the conduct of industry participants – in particular, the business models and competitive strategies of these entities. In this section of the Report, we discuss OVD competition in terms of both price and non-price rivalry.

286. As the delivery of online video is in its infancy, no single business strategy has emerged as the industry standard. As several commenters recognize, technology, delivery mechanisms, content acquisition, licensing strategies, and consumer demand patterns all remain in flux.⁹²⁰

287. An OVD's business model must account for the existence of broadcasters and MVPDs. MVPDs in particular have taken steps in recent years to expand the libraries of on-demand content they can provide to their customers.⁹²¹ This strategy puts pressure on OVDs to continue to expand their content libraries and/or to offer unique content. Moreover, so-called TV Everywhere services allow MVPDs to compete with unaffiliated OVDs by providing free on-demand Internet video to authenticated MVPD customers.⁹²²

288. An OVD also must contend with competition from DVDs, such as the DVD rental side of Netflix's business,⁹²³ Redbox, which allows customers to rent DVDs and Blu-ray discs from more than 28,000 kiosks nationwide,⁹²⁴ and Blockbuster, which provides DVD rentals by mail.⁹²⁵ In addition, while

⁹¹⁷ See Sezmi to Shut Down: Sezmi Cable Killer: How Sezmi Stacks Up.

⁹¹⁸ See *id.*

⁹¹⁹ See Sezmi Says Goodbye: Sezmi to Shut Down.

⁹²⁰ See, e.g., Google 6/8/11 Comments at 4; NAB 6/8/11 Comments at 31 (noting variety of programming, revenue models, and distribution options in the OVD marketplace).

⁹²¹ See, e.g., Heather Wilner, *The Best Gets Better, and a Whole Lot Bigger: FiOS TV VOD Library Reaches 24,000*, Verizon at Home, Apr. 25, 2011, <http://forums.verizon.com/t5/Verizon-at-Home/The-Best-Gets-Better-and-a-Whole-Lot-Bigger-FiOS-TV-VOD-Library/ba-p-305255> (visited Feb. 16, 2012) (noting that Verizon FiOS offers more than 24,000 monthly VOD titles (movies and television shows), including 3,800 HD VOD titles per month); Todd Spangler, *Comcast: VOD Movie Views In Our Markets Well Ahead Of Netflix's*, MULTICHANNEL NEWS, Apr. 14, 2011, http://www.multichannel.com/article/466818-Comcast_VOD_Movie_Views_In_Our_Markets_Well_Ahead_Of_Netflix_s.php (visited Feb. 16, 2012) (noting Comcast's statements that the company offers more than 11,000 VOD movies in many markets and an average of more than 350 million VOD views per month overall, of which tens of millions are movies).

⁹²² See *supra*, ¶¶ 21, 96; Netflix 6/8/11 Comments at 6 ("By bundling traditional MVPD services with Internet delivery of content, vertically integrated MVPDs leverage their dominant market position at the expense of competitive online offerings.").

⁹²³ Netflix, *Netflix Plans*, <http://www.netflix-dvd.com/netflix-plans.html> (visited Feb. 16, 2012).

⁹²⁴ Redbox, *Redbox Info*, <http://www.redbox.com/facts> (visited Feb. 16, 2012).

⁹²⁵ Blockbuster, *Blockbuster Total Access*, <https://www.blockbuster.com/signup/my-plan> (visited Mar. 5, 2012). In addition to DVD rentals, the company's "Blockbuster Total Access" service includes video games by mail, the ability to exchange discs in Blockbuster stores, and streaming of video content to the TV and PC. See *id.*; Wade Holden, *DISN's Timing Perfect for Blockbuster Streaming Reveal*, SNL Kagan, Sept. 29, 2011.

DVD sales have been declining in recent years, in part due to competition from OVDs.⁹²⁶ DVDs still constitute a competitor to the online delivery of video content. DVDs often offer extras that appeal to consumers, such as director's cuts, deleted scenes, commentary, and additional content,⁹²⁷ which often are not available via OVDs.⁹²⁸

289. In addition, an OVD's business model needs to account for competition from other OVDs, bearing in mind that, while most consumers subscribe to only one MVPD, it is easy for consumers to access video content via multiple OVDs.

a. Price Rivalry

290. Unlike the broadcasting or MVPD industries, the OVD industry does not have a single revenue model. Depending on the OVD, consumers can gain access to programming in several ways, including: (1) for free, usually with advertising; (2) through a subscription service, with or without advertising; (3) on a per program basis for a fee; or (4) via "electronic sell-through" ("EST"), where a consumer pays a one-time fee to download a television show, movie, or other media to be stored locally on a hard drive.⁹²⁹ Any OVD may implement any one or a combination of these business models.

291. Some OVDs provide video content for free. As a general rule, free OVD content is usually supported by advertisements delivered to viewers. Network portals, for example, generally provide their streams to users free of charge.⁹³⁰ Yahoo Screen and Sony's Crackle service provide free content, and most of the content available on YouTube is free as well.⁹³¹

292. Other OVDs use subscription-based models. For example, while Hulu's basic service is free, Hulu Plus charges subscribers \$7.99 a month for access to premium content, HD video (when available), and the ability to watch video on non-PC devices such as smartphones, tablets, gaming consoles, smart televisions, or Blu-ray players, or through set-top boxes.⁹³² Content delivered to Hulu Plus subscribers also contains advertisements.⁹³³ For a flat monthly fee (as of February 2012, \$7.99),

⁹²⁶ See, e.g., David Lieberman, *DVD Disaster? Study Says Sales Plummeted In 2010, Contrary To Industry Report*, Deadline, May 12, 2011, <http://www.deadline.com/2011/05/dvd-disaster-study-says-sales-plummeted-in-2010-contrary-to-industry-report/> (visited Feb. 16, 2012); Shane Smith, *Dreamworks Exec on DVD Sales Decline: "Greed Killed the Goose"*, Inside Redbox, May 12, 2010, <http://www.insideredbox.com/dreamworks-exec-on-dvd-sales-decline-greed-killed-the-geese/> (visited Feb. 16, 2012).

⁹²⁷ See, e.g., DVD Special Features & Extras, <http://dvdspecialfeatures.net/> (Internet website providing "An Online Database of DVD Extras and Bonus Features" including director's cuts, behind the scenes footage, deleted scenes, bloopers, and other content).

⁹²⁸ See, e.g., Liz Gannes, *DVD Extras Are the Future of the Internet*, Gigaom, Aug. 5, 2008, <http://gigaom.com/video/dvd-extras-are-the-future-of-the-internet/> (visited Mar. 6, 2012).

⁹²⁹ Home Media Magazine, *Digital Glossary*, <http://www.homemediamagazine.com/electronic-delivery/digital-glossary> (visited Feb. 27, 2012) ("Digital Glossary"). When discussing EST, this particular report focuses on situations where video content "is made available to consumers on a download-to-own basis, as opposed to . . . where content is rented for a specific period of time." Anytime On Demand, *Media Centre: Glossary of Terms*, http://www.anytimeondemand.com/glossary_of_terms.html#electronic (visited Feb. 27, 2012).

⁹³⁰ See, e.g., ABC Network Portal, NBC Network Portal, CBS Network Portal, and FOX Network Portal.

⁹³¹ See, e.g., Yahoo, *Yahoo Screen*, <http://screen.yahoo.com> (visited Mar. 22, 2012); YouTube, <http://www.youtube.com>. See also *supra*, ¶ 248.

⁹³² See *Introducing Hulu Plus: Hulu, Hulu Plus & Devices*, <http://www.hulu.com/plus/devices> (visited Feb. 29, 2012) ("Hulu Plus Devices"); Hulu, *Hulu Plus*, <http://www.hulu.com/plus> (visited Feb. 29, 2012).

⁹³³ Hulu, *Help: Why Are There Ads In Hulu Plus?*, <http://www.hulu.com/support/article/20356372> (visited Feb. 24, 2012) ("Ads In Hulu Plus").

Netflix's subscription streaming video service allows a subscriber to access an unlimited amount of online content, commercial free.⁹³⁴ Sometimes OVD subscriptions are part of a larger subscription product. One example is, Amazon Prime, a service from Amazon.com that, for payment of an annual fee, gives subscribers free two-day shipping on many items sold on its website, free book borrowing for Amazon Kindle, and unlimited, commercial-free, instant streaming of thousands of movies and television shows.⁹³⁵

293. As noted above, the four major U.S. professional sports leagues offer subscription-based online video services as well. These services provide live games online, each with its own variations or tiers depending on factors such as in-market availability; home equipment; and/or MVPD subscription.⁹³⁶

294. Some OVDs offer "rental" content on a pay-per-program basis. For example, under YouTube's movie rental service, a user that purchases a "24 hour pass" for a movie may begin streaming that movie any time within the next 30 days, with all viewing completed within 24 hours of initiating playback.⁹³⁷ Other OVDs, such as Facebook, Vudu, and Amazon have similar services, allowing users to view a movie or program during a fixed period of time for a one-time fee.⁹³⁸

295. The EST model is also prevalent. A consumer who purchases video content via EST can watch that content as many times as he or she desires (although certain files might become unusable over time or may not be viewable using competing platforms).⁹³⁹ One well-known EST OVD is Apple, which provides downloadable media files, including movies and television shows, via iTunes.⁹⁴⁰ Once a file is

⁹³⁴ See Netflix Signup; Don Reisinger, *Netflix Not Into Ads*, CNET, Feb. 11, 2011, http://news.cnet.com/8301-13506_3-20031514-17.html (visited Feb. 24, 2012).

⁹³⁵ See Amazon Prime.

⁹³⁶ See, e.g., Mark Newman, *Must-have MLB.TV Features New Lower Prices*, mlb.com, May 2, 2011, http://mlb.mlb.com/news/article.jsp?ymd=20110430&content_id=18432398&key=news_mlb&c_id=mlb (visited Feb. 24, 2012); DIRECTV, *NFL Sunday Ticket*, http://www.directv.com/DTVAPP/content/sports/nfl_online_mobile (visited Feb. 24, 2012) ("NFL Mobile"); Phillip Rosenberg, *Kickoff the NFL Season on PS3 With the NFL SUNDAY TICKET App, Available Today on Playstation Network*, PlayStation.Blog, Sept. 6, 2011, <http://blog.us.playstation.com/2011/09/06/kickoff-the-nfl-season-on-ps3-with-the-nfl-sunday-ticket-app-available-today-on-playstation-network/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Broadband*, <https://account.nba.com/leaguepass/broadband/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Mobile*, <http://www.nba.com/leaguepass/mobile/> (visited Feb. 24, 2012); NHL.com, *NHL GameCenter Live*, <https://gamecenter.nhl.com/nhlge/secure/gelsignup> (visited Feb. 24, 2012).

⁹³⁷ YouTube World, *YouTube Movie Rental Service Streams 3000 More Movies*, <http://youtubeking10.blogspot.com/2011/05/youtube-movie-rental-service-streams.html> (visited Feb. 24, 2012); Barb Gonzalez, *YouTube Movie Rental Service – Review*, About.com, <http://hometheater.about.com/od/Network-Media-Player-Reviews/fr/YouTube-Movie-Rental-Service-Review.htm> (visited Feb. 24, 2012).

⁹³⁸ See, e.g., Ben Fritz and Jessica Guynn, *Facebook to Offer Movie Rentals*, L.A. TIMES, Mar. 9, 2011, <http://articles.latimes.com/2011-mar-09/business/la-fi-facebook-movies-20110309> (Facebook movie rental allows a user to watch a movie within a 48 hour period for \$3.00) (visited Feb. 24, 2012); Vudu, *Terms of Service*, <http://www.vudu.com/terms/service.html> (when content is rented from Vudu, a user "will typically have 30 days to initiate viewing. Once initiated, viewing must typically be completed within 24 hours or before the end of the 30th day from date of initiation, whichever occurs sooner.") (visited Feb. 24, 2012); Amazon.com, *Amazon Instant Video*, http://www.amazon.com/gp/video/ontv/start/ref=sv_mov_aiv_1 ("Rentals start at \$2.99. If you rent, you'll have 30 days from when you rent to start watching, and once you've downloaded or start watching, most movies have a 24-hour window to finish watching.") (visited Feb. 24, 2012).

⁹³⁹ Digital Glossary.

⁹⁴⁰ What's On iTunes.

downloaded, users can watch it as many times as they want on their computers, televisions, iPods, iPhones, and/or iPads.⁹⁴¹ Sales, as opposed to rentals, of movies by Vudu and Amazon follow an EST model as well.⁹⁴²

b. Non-Price Rivalry

296. OVDs compete with, and differentiate themselves from, one another based on several non-price factors. Key points of non-price rivalry include the content of an entity's program library; advertising; and multi-device accessibility.

297. *Content Library.* The breadth and timeliness of an OVD's video content library helps establish its identity and business strategy. Increasingly, OVD consumers expect access to a wide variety of content, including newly released movies and recently aired television shows. As discussed below, many of the major players in the OVD marketplace have worked to expand and improve their content libraries, but face challenges in doing so.

298. The degree to which broadcast and cable networks make their programming available online via their portals varies tremendously. Some networks have been aggressive in making their content libraries fully available, particularly through their applications. For example, through HBO Go, HBO subscribers can obtain unlimited access to every episode of every season of HBO original programming without additional cost.⁹⁴³

299. The bigger OVD players tend to provide large libraries of content to users. For example, NBC, ABC, and FOX all provide content to Hulu, including current and past episodes of television programs.⁹⁴⁴ Hulu Plus subscribers have access to all current-season episodes of many hit shows, plus classic shows, including many full-series runs.⁹⁴⁵ This content is provided in HD, where available.⁹⁴⁶ In late 2011, Hulu acquired licensing rights to make 11 sitcoms from Carsey Werner TV Distribution available to Hulu Plus subscribers, and entered into a five-year licensing agreement to stream in-season episodes of The CW network television shows to its subscribers.⁹⁴⁷ The parent companies that have invested in Hulu have made full-length movies – often library content several years or decades old –

⁹⁴¹ *Id.*

⁹⁴² Vudu.com, *Knowledgebase Home > Billing*, <http://supports.vudu.com/questions/93/How+much+does+VUDU+cost%3F+> (visited Feb. 27, 2012); Amazon.com, *Instant Video Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200026970> (visited Feb. 27, 2012).

⁹⁴³ HBO Go, *What is HBO Go?*, <http://www.hbogo.com/#whatis/> (visited Mar. 12, 2012).

⁹⁴⁴ Hulu, *Frequently Asked Questions*, http://www.hulu.com/about/media_faq (visited Feb. 27, 2012). CBS still has not provided any content for Hulu in the U.S. market. *Id.*; Nikki Finke, *SURPRISE! Holdout CBS To Deliver Content To Hulu - But Only For Japan Market*, Deadline, Sept. 1, 2011, <http://www.deadline.com/2011/09/surprise-cbs-to-deliver-content-to-hulu-for-japanese-subscribers/> (visited Feb. 27, 2012).

⁹⁴⁵ Introducing Hulu Plus.

⁹⁴⁶ *Id.*

⁹⁴⁷ Haseeb Ali, *Report: Hulu Secures Licensing Rights to 11 Sitcoms*, SNL Kagan, Nov. 23, 2011; Tim Kenneally, *CW Strikes 5-Year Deal With Hulu for New Shows*, Reuters, Oct. 28, 2011, <http://www.reuters.com/article/2011/10/28/idUS190340544120111028> (visited Feb. 28, 2012).

available on Hulu as well.⁹⁴⁸ As of December 2011, Hulu's website lists more than 300 content partners.⁹⁴⁹

300. In addition, Hulu has announced plans to raise capital to expand into original programs that it would make available both to free users and paid subscribers.⁹⁵⁰ Hulu may spend as much as \$500 million on new television shows and films.⁹⁵¹ Andy Forssell, chief content officer at Hulu, states that, "[w]e considered giving earlier access to [Hulu] Plus users and other benefits, but right now the aim is to get . . . [shows and films] out to as many folks as possible."⁹⁵²

301. Netflix has expanded its library of streaming content in recent years as well. Netflix first began to allow viewers to watch movies and television shows on their computers in 2007 on a "metered" basis of hours. In January 2008, Netflix offered unlimited PC streaming to consumers with unlimited subscriptions.⁹⁵³ When Netflix first introduced its Watch Instantly streaming video service, its catalog was comprised mostly of older movies.⁹⁵⁴ On October 1, 2008, Netflix announced a partnership deal with Starz to bring 2,500 new movies and television shows to Watch Instantly.⁹⁵⁵ Netflix made a more aggressive move to distribute newer movies when it agreed in August 2010 to pay an estimated \$900 million to cable channel Epix for the five-year streaming rights to films from Paramount Pictures, Lionsgate, and Metro-Goldwyn-Mayer.⁹⁵⁶ Now, Netflix has streaming deals with almost every major television content creator, including, but not limited to, NBC, ABC, CBS, FOX, The CW, and Time Warner.⁹⁵⁷ On the other hand, Starz recently ended its streaming relationship with Netflix, causing the

⁹⁴⁸ Hulu, *Movies, All Universal Pictures Titles*, <http://www.hulu.com/studio/universal-pictures?sort=name> (listing of Universal Pictures movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Twentieth Century Fox Titles*, <http://www.hulu.com/studio/twentieth-century-fox?sort=name> (listing of Twentieth Century Fox movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Miramax Titles*, <http://www.hulu.com/studio/miramax?sort=name> (listing of Miramax movie titles) (visited Feb. 27, 2012).

⁹⁴⁹ Hulu, *Content*, <http://www.hulu.com/partners> (visited Feb. 27, 2012).

⁹⁵⁰ Andy Fixmer, *Hulu Plans to Raise Money to Fund Expansion into Original Shows*, BLOOMBERG BUSINESSWEEK, Jan. 18, 2012, <http://www.businessweek.com/news/2012-01-18/hulu-plans-to-raise-money-to-fund-expansion-into-original-shows.html> (visited Feb. 28, 2012).

⁹⁵¹ *Id.*

⁹⁵² *Id.*

⁹⁵³ See Netflix, Press, <https://signup.netflix.com/Press> (visited Feb. 28, 2012); *supra*, ¶ 252.

⁹⁵⁴ See Saul Hansell, *iTunes Movie Rentals and Netflix Online: Different Markets*, N.Y. TIMES, Jan. 16, 2008, <http://bits.blogs.nytimes.com/2008/01/16/itunes-movie-rentals-and-netflix-online-different-markets> (visited Feb. 29, 2012). At the beginning of 2008, Watch Instantly had only 6,000 titles. *Id.*

⁹⁵⁵ Dawn Chmielewski, *More Mainstream Movies for Netflix Online*, L.A. TIMES, Oct. 1, 2008, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2008/10/more-mainstream.html> (visited Feb. 29, 2012).

⁹⁵⁶ Brian Stelter, *Netflix to Stream Films from Paramount, Lions Gate, MGM*, N.Y. TIMES, Aug. 10, 2010, <http://mediadecoder.blogs.nytimes.com/2010/08/10/netflix-to-stream-films-from-paramount-lionsgate-mgm> (visited Feb. 29, 2012).

⁹⁵⁷ See Paul Bond, *What Hollywood Execs Privately Say About Netflix*, THE HOLLYWOOD REPORTER, Jan. 14, 2011, <http://www.hollywoodreporter.com/news/hollywood-execs-privately-netflix-71957> (visited Feb. 29, 2012); Paul Bond, *Netflix Renews Deal With NBCUniversal for Streaming TV Shows, Movies*, THE HOLLYWOOD REPORTER, July 21, 2011, <http://www.hollywoodreporter.com/news/netflix-renews-deal-nbcuniversal-streaming-210792> (visited Feb. 29, 2012) ("Netflix NBC Deal"); Todd Spangler, *Disney ABC Extends Netflix Deal, Cuts One With Amazon*, MULTICHANNEL NEWS, Oct. 31, 2011, <http://www.multichannel.com/article:475953-Disney-ABC-Extends-Netflix-Deal-Cuts-One-With-Amazon.php> (visited Feb. 29, 2012); Netflix CW Deal.

OVD to lose access to a major source of new movie streaming content.⁹⁵⁸ Many other studios reportedly are reluctant to allow Netflix to stream new titles for fear that doing so would harm DVD sales and video-on-demand rental revenues.⁹⁵⁹

302. In some cases, Netflix is able to stream content to users soon after it initially airs. For example, Netflix's deal with NBC allows it to stream episodes of many shows one day after they are initially broadcast.⁹⁶⁰ In other cases, users must wait before certain content is available for streaming via Netflix. Under Netflix's agreement with Disney/ABC, for example, episodes from the current season's series will not be made available to the OVD until 30 days after the last episode of each season airs.⁹⁶¹

303. Netflix provides an illustrative example of how OVDs acquire and distribute studios' content. Netflix has provided an outlet for studios to recoup their costs for network programming.⁹⁶² For example, in 2011 Netflix purchased streaming rights from Warner Brothers for FX's *Nip/Tuck* (after Warner Brothers failed to sell off-network syndication rights) and from Lionsgate for AMC's *Mad Men*.⁹⁶³ The latter was unusual because *Mad Men* has not aired in syndication, as have most other programs included in subscription video-on-demand ("SVOD").⁹⁶⁴ As of 2011, 60 percent of Netflix streams were television episodes.⁹⁶⁵ Netflix has been increasing the number of television series it offers (from 477 to 1,080 between January 2011 and September 2011) faster than the number of movies it offers (from 8,950 to 9,342 during the same period).⁹⁶⁶ Moreover, as discussed above, Netflix has also commissioned several original television series.⁹⁶⁷ Netflix develops programming based on analysis of its database of its customers' viewing patterns and quality ratings. Its intent is to attract a smaller but more dedicated cadre of viewers than network programming. Netflix offers television consumers the ability to view sequentially episodes of television series that they may have missed. Thus, Netflix may create demand for in-season viewing of network series. Netflix's impact on movie audiences may be different, leading studios to limit delivery of streaming content.⁹⁶⁸

⁹⁵⁸ Ben Fritz, Joe Flint & Dawn C. Chmielewski, *Starz to End Streaming Deal with Netflix*, L.A. TIMES, Sept. 2, 2011, <http://articles.latimes.com/2011/sep/02/business/la-fi-ct-netflix-starz-20110902> (visited Feb. 29, 2012).

⁹⁵⁹ Netflix CW Deal.

⁹⁶⁰ Netflix NBC Deal.

⁹⁶¹ Netflix Inc., *Netflix and Disney-ABC Television Group Announce Extension of Existing Licensing Agreement to Stream TV Shows* (press release), Oct. 31, 2011.

⁹⁶² Andrew Wallenstein, *Digital Dollars Amp Syndie Biz*, VARIETY, July 21, 2011, <http://www.variety.com/article/VR1118040194> (visited Feb. 29, 2012).

⁹⁶³ Deana Myers, *Digital Rights in Off-Network Syndication Deals*, SNL Kagan, Apr. 20, 2011.

⁹⁶⁴ Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rights*, VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062Cached> (visited Feb. 29, 2012). Subscription OVDs, such as Netflix and Amazon Prime, are considered subscription video-on-demand services.

⁹⁶⁵ Ben Fritz & Joe Flint, *Netflix Less About Flicks, More About TV*, L.A. TIMES, Feb. 4, 2012, <http://articles.latimes.com/2012/feb/04/business/la-fi-ct-netflix-20120205> (visited Feb. 29, 2012); Perkin di Grazia, *Netflix's Future is In TV*, SNL Kagan, Oct. 24, 2011.

⁹⁶⁶ *Id.*

⁹⁶⁷ See *supra*, ¶ 262.

⁹⁶⁸ Netflix 2010 Form 10-K at 6-7.

304. YouTube provides a significant amount of streaming television content. Each of the four major broadcast networks has a YouTube channel,⁹⁶⁹ as do a host of basic⁹⁷⁰ and premium⁹⁷¹ cable networks. These channels focus on short clips, however, rather than full episodes. YouTube's ability to acquire distribution rights to long-form broadcast television content is limited by the relationships News Corp., NBC Universal, and Disney have with Hulu.⁹⁷² YouTube also partners with a wide variety of third-party content creators to provide numerous free channels to users.⁹⁷³ In October 2011, YouTube announced plans to launch more than 100 new video channels featuring ad-supported free original content provided by third-party partners such as *The Wall Street Journal*, Jay-Z, Madonna, Ashton Kutcher, and Shaquille O'Neal.⁹⁷⁴ The YouTube channels will feature videos in 20 different categories like sports, comedy, and news.⁹⁷⁵

305. In addition, YouTube allows users to rent (*i.e.*, stream on a pay-per-movie basis) films from the Sundance Film Festival and thousands of full-length feature films from major Hollywood studios.⁹⁷⁶ In November 2011, it announced that hundreds of Walt Disney movies would be coming to

⁹⁶⁹ YouTube, *NBC Network*, <http://www.youtube.com/user/NBC> (visited Feb. 29, 2012); YouTube, *ABC Television*, <http://www.youtube.com/user/abcnetwork?blend=2&ob=4> (visited Feb. 29, 2012); YouTube, *CBS*, <http://www.youtube.com/user/cbs?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *FOX*, <http://www.youtube.com/user/FoxBroadcasting> (visited Feb. 29, 2012).

⁹⁷⁰ See, e.g., YouTube, *TruTV*, <http://www.youtube.com/user/truTVnetwork> (visited Feb. 29, 2012); YouTube, *ESPN*, <http://www.youtube.com/user/espn?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Discovery Channel*, <http://www.youtube.com/user/discoverynetworks?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Lifetime Television*, <http://www.youtube.com/user/lifetime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *History*, <http://www.youtube.com/user/historychannel?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *TLC*, <http://www.youtube.com/user/tlc?blend=1&ob=4> (visited Feb. 29, 2012).

⁹⁷¹ See, e.g., YouTube, *HBO's Channel*, <http://www.youtube.com/user/HBO?feature=watch> (visited Feb. 29, 2012); YouTube, *Showtime*, <http://www.youtube.com/user/showtime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Cinemax's Channel*, <http://www.youtube.com/user/cinemax?blend=1&ob=4> (visited Feb. 29, 2012).

⁹⁷² See, e.g., Peter Kafka, *Hulu Buyers Would Get Exclusive Content, With Strings Attached*, All Things D, June 27, 2011, <http://allthingsd.com/20110627/hulu-buyers-would-get-exclusive-content-with-strings-attached/> (discussing Hulu's content relationships with Disney and News Corp.) (visited Feb. 29, 2012).

⁹⁷³ See YouTube, *Add Channels*, <http://www.youtube.com/members?t=a&p=1&s=ms&g=0> (browsable menu of YouTube channels) (visited Feb. 29, 2012).

⁹⁷⁴ See Erik Gruenwedel, *YouTube Bows Original Content Channels; Google TV Gets Reboot*, HOME MEDIA MAGAZINE, Oct. 29, 2011, <http://www.homemediamagazine.com/streaming/youtube-bows-original-content-channels-google-tv-gets-reboot-25503> (visited Feb. 24, 2012); Michael Grotticelli, *YouTube to Launch 100 Online Channels*, BROADCAST ENGINEERING, Nov. 3, 2011, <http://broadcastengineering.com/news/youtube-launch-100-channels-110311/> (visited Feb. 28, 2012); *YouTube to Launch 100 Channels: Madonna, Ashton Kutcher, Jay-Z to Produce Shows*, INTERNATIONAL BUSINESS TIMES, Oct. 29, 2011, <http://www.ibtimes.co.uk/articles/239892/20111029/youtube-launch-100-channels-madonna-ashton-kutcher.htm> (visited Feb. 28, 2012).

⁹⁷⁵ See *id.*

⁹⁷⁶ Athima Chansanchai, *Now at YouTube: 3,000 More Movie Rentals*, msnbc.com, May 11, 2011, http://technolog.msnbc.msn.com/_news/2011/05/10/6617922-now-at-youtube-3000-more-movie-rentals (visited Feb. 29, 2012) ("Now at YouTube"); YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Get More Into Movies on YouTube*, May 9, 2011, <http://youtube-global.blogspot.com/2011/05/get-more-into-movies-on-youtube.html> (visited Feb. 29, 2012).

YouTube.⁹⁷⁷ In many cases, YouTube's movies are available for streaming simultaneously with DVD release.⁹⁷⁸

306. Amazon has 13,000 titles available on Amazon Prime,⁹⁷⁹ and over 100,000 movies and television shows available overall.⁹⁸⁰ The company has been entering into deals recently to grow its television catalog in particular. In July 2011, Amazon acquired the rights to stream thousands of CBS shows online, in a deal estimated to be worth more than \$100 million.⁹⁸¹ Amazon also obtained a license from Disney in October 2011 that will make more than 800 episodes of ABC television shows available to Amazon Prime subscribers.⁹⁸²

307. Vudu's library has more than 30,000 movies and television episodes, and the company claims it has the largest catalog of HD movies available on demand.⁹⁸³ Almost all of its movies are available the same day that they are released on DVD.⁹⁸⁴

308. *Advertisements.* OVDs also compete based on the amount and type of advertising contained in the programming they provide to consumers. Often, OVD content that is provided to users free of charge will contain advertisements, and users expect this to be the case. Subscription or pay-per-program OVD content, however, generally contains fewer or no advertisements.

309. Crackle and Yahoo Screen provide free content that contains advertisements.⁹⁸⁵ Similarly, full television episodes viewed via the network portals for the four major broadcast networks contain advertisements,⁹⁸⁶ as does content provided via Hulu's non-subscription service.⁹⁸⁷ Hulu Plus content contains advertisements as well, purportedly to keep the subscription price low and because of the

⁹⁷⁷ YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Welcoming Your Favorite Disney Movies to Rent on YouTube*, Nov. 23, 2011, <http://youtube-global.blogspot.com/2011/11/welcoming-your-favorite-disney-movies.html> (visited Feb. 29, 2012).

⁹⁷⁸ Now at YouTube.

⁹⁷⁹ See Amazon.com, *What is Prime Instant Video*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000739191> (visited Feb. 29, 2012).

⁹⁸⁰ Matt Burns, *Watch Out Netflix, Amazon Instant Video Reaches 100,000 On-Demand Titles*, Tech Crunch, Aug. 18, 2011, <http://techcrunch.com/2011/08/18/watch-out-netflix-amazon-instant-video-reaches-100000-on-demand-titles/> (visited Feb. 29, 2012).

⁹⁸¹ *CBS Licenses Shows to Amazon in Challenge to Netflix and Hulu*, ADVERTISING AGE, July 20, 2011, <http://adage.com/article/mediaworks/cbs-licenses-shows-amazon-challenge-netflix-hulu/228815/> (visited Feb. 29, 2012).

⁹⁸² *The Streaming Video Wars: Amazon Prime Adds ABC and Disney TV Shows*, ADVERTISING AGE, Oct. 31, 2011, <http://adage.com/article/mediaworks/streaming-war-amazon-prime-adds-abc-disney-tv-shows/230732/> (visited Feb. 29, 2012).

⁹⁸³ Jillian, *Taking a Swing at Netflix, VUDU Expands TV Content Library*, PadGadget, Sept. 22, 2011, <http://www.padgadget.com/2011/09/22/taking-a-swing-at-netflix-vudu-expands-tv-content-library/> (visited Feb. 15, 2012); Vudu, *The Vudu Difference*, <http://www.vudu.com/difference.html> (visited Feb. 15, 2012).

⁹⁸⁴ See *id.*

⁹⁸⁵ David Jackson, *Sony's Crackle Expands Ad-Supported Video Streaming*, The Stream Report, Mar. 29, 2011, <http://thestreamreport.com/?p=262> (visited Feb. 29, 2012); E.B. Boyd, *Yahoo Launches Video Destination Site*, FAST COMPANY, Oct. 4, 2011, <http://www.fastcompany.com/1784990/yahoo-launches-video-destination-site> (visited Feb. 29, 2012).

⁹⁸⁶ See ABC Network Portal; NBC Network Portal; CBS Network Portal; FOX Network Portal.

⁹⁸⁷ About Hulu.

licensing costs associated with premium content.⁹⁸⁸ Hulu has distinguished itself from its broadcasting counterparts by showing fewer advertisements. For example, it has just two minutes of promotions in an episode of a situation comedy compared to eight minutes of advertising on broadcast television.⁹⁸⁹ Hulu also gives users some control over the advertising experience, sometimes allowing viewers to choose between one long commercial at the beginning of a show or several short ones spread throughout a program,⁹⁹⁰ and to swap out less relevant advertisements for more relevant ones.⁹⁹¹

310. Content provided via Netflix's subscription service is ad free,⁹⁹² as is content provided to Amazon Prime customers.⁹⁹³ Movie rentals via Facebook, Amazon, and YouTube contain no advertisements.⁹⁹⁴ EST OVD programming provided by Vudu, Amazon, and iTunes is free of advertisements as well.⁹⁹⁵

311. *Multi-Device Accessibility.* Consumers increasingly wish to view content whenever they want and wherever they are. As a result, the trend in the OVD marketplace is toward making content available to users via a wide variety of devices. Many of the leading OVDs make their service available via a wide variety of consumer electronics products, including computers, Internet-connected televisions, Blu-ray disc players, home theater systems, DVRs, set-top boxes, Internet video players/boxes, and mobile devices.

⁹⁸⁸ Ads In Hulu Plus.

⁹⁸⁹ Chuck Salter, *Can Hulu Save Traditional TV?*, FAST COMPANY, Nov. 1, 2009, at 4, <http://www.fastcompany.com/magazine/140/the-unlikely-mogul.html> (visited Feb. 29, 2012).

⁹⁹⁰ Kevin Purdy, *Watch Hulu Shows With Only One Commercial*, Lifehacker, Feb. 23, 2009, <http://lifehacker.com/5158623/watch-hulu-shows-with-only-one-commercial> (visited Feb. 29, 2012).

⁹⁹¹ Tom Cheredar, *Hulu's "Ad Swap" Puts Users in Control of What Commercials to Watch*, Venturebeat, Oct. 3, 2011, <http://venturebeat.com/2011/10/03/hulu-commercials/> (visited Feb. 29, 2012).

⁹⁹² Sony, *Crackle Is First to Offer Ad-Supported Full-Length Hollywood Movies and Television Series on Sony's PlayStation 3, BRAVIA Streaming Player, Blu-Ray Players and on Roku Devices* (press release), Mar. 29, 2011 ("Crackle Full-Length Movies"); Kristie Bertucci, *Netflix vs. Hulu Plus (Comparison)*, Gadget Review, Jan. 8, 2012, <http://www.gadgetreview.com/2012/01/netflix-vs-hulu-plus.html> (visited Feb. 29, 2012); Jeff Bertolucci, *Hulu Plus vs. Netflix: Which Is Better?*, PC WORLD, June 30, 2010, <http://www.peworld.com/article/200246/hulu-plus-vs-netflix-which-is-better.html> (visited Feb. 29, 2012).

⁹⁹³ Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release).

⁹⁹⁴ See Facebook, *Movie Rentals*, <http://www.facebook.com/movie.rentals> (visited Mar. 21, 2012); Amazon.com, *Movies & TV > Amazon Instant Video > Rental*, http://www.amazon.com/s/ref=amb_link_357789482_3?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3ARental&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WBFJC2JBXXC1718C1F&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011 (visited Mar. 21, 2012); YouTube Movies.

⁹⁹⁵ Simply Sight & Sound, Inc., *Vudu's PC Streaming Now Available*, <http://simplysightandsound.com/audio-video-installation-services/vudus-pc-streaming-now-available/> (visited Feb. 29, 2012); What's On iTunes: Amazon.com, *Movies & TV > Amazon Instant Video > Purchase*, http://www.amazon.com/s/ref=amb_link_357789482_4?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3APurchase&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WEAX8VA0ZK20GZWN9&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011 (visited Mar. 21, 2012).

312. For example, more than 700 devices can stream Netflix, including video game consoles, Video Players, HDTVs, home theater systems, set-top boxes, and smartphones.¹⁰⁰⁰ Vudu states that its service is available on “virtually every internet-connected Blu-ray player and HDTV on the market,” as well as Xbox 360, Sony PS3, the Apple iPad, and other devices.¹⁰⁰¹ While users of Hulu’s free service can view content only on their computers, Hulu Plus subscribers can access Hulu programming on a wide variety of smartphones, tablets, gaming consoles, smart TVs, Blu-ray players, and set-top boxes.¹⁰⁰² Sony’s Crackle users can access content with their computers (via www.crackle.com, other OVD websites such as YouTube, Hulu, and TV.com, and an app for Google Chrome), Internet-connected televisions, Xbox 360, Sony PlayStation 3, various smartphones, set-top boxes and media players, and Sony HDTVs.¹⁰⁰³ Over 300 devices are compatible with Amazon’s Instant Video service, including computers, various HDTVs, set-top boxes, Blu-ray players, DVRs, and the Kindle Fire.¹⁰⁰⁴ YouTube allows users to view content on computers, Android devices, some Internet-connected televisions, iPhones, and other devices with that have browsers, Adobe Flash Player 11.0+, and a broadband Internet connection of at least 1 Mbps.¹⁰⁰⁵

313. Some sports leagues make content available via multiple devices as well. For example, NBA League Pass is available via computers and mobile devices.¹⁰⁰⁶ NHL GameCenter Live is available via computer, iPad, iPhone, or Android devices.¹⁰⁰⁷ Online NFL games are available via computer, smartphones, tablets, or PlayStation3.¹⁰⁰⁸ The Big Ten makes its online content available via mobile devices,¹⁰⁰⁹ and the ACC Digital Network is viewable on a variety of devices, including computers, iPhones, iPads, and Android devices.¹⁰¹⁰

4. OVD Performance

314. As we have noted, the performance of OVDs is an evolving story. Virtually all OVDs entered the marketplace within the last ten years, and, because of the nature of the product and services provided, do not necessarily report their financial performance by the indicia traditionally used by other media firms. As such, the details surrounding the finances of OVDs are not readily discerned because many OVDs are divisions of larger media firms and the OVD-related activities are not reported

¹⁰⁰⁰ Netflix, *Company Overview*, <https://signup.netflix.com/MediaCenter?country=I&rdirdc=true> (visited Feb. 29, 2012).

¹⁰⁰¹ See Vudu Devices: Vudu, *Get Vudu On Your iPad*, http://www.vudu.com/setup_ipad.html (visited Feb. 29, 2012).

¹⁰⁰² See Hulu Plus Devices: Introducing Hulu Plus.

¹⁰⁰³ Crackle, *Platforms*, <http://www.crackle.com/outreach/platforms> (visited Feb. 28, 2012); Crackle Full-Length Movies.

¹⁰⁰⁴ See Amazon Devices.

¹⁰⁰⁵ YouTube, *YouTube Help ~ YouTube on Other Devices*, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=1231722> (visited Feb. 29, 2012); eHow, *How to Use YouTube on an iPhone*, http://www.ehow.com/how_5935516_use-youtube-iphone.html (visited Feb. 29, 2012).

¹⁰⁰⁶ NBA, *NBA League Pass ~ Features-At-A-Glance*, <http://www.nba.com/leaguepass/3pp/> (visited Feb. 29, 2012).

¹⁰⁰⁷ NHL, *NHL GameCenter Devices*, <http://mobile.gamecenter.nhl.com/devices/> (visited Feb. 29, 2012).

¹⁰⁰⁸ NFL Mobile: NFL To PlayStation.

¹⁰⁰⁹ BTN2GO Kicks Off: BTN2Go FAQ. BTN2Go indicates that an Android application for viewing the service’s content is expected to launch in early 2012. *Id.*

¹⁰¹⁰ ACC Launches.

separately. Moreover, our analysis of OVD performance is limited to a few of the most widely recognized industry players, and is not intended to be a comprehensive assessment of the entire OVD industry. With these limitations, in this section of the Report we describe OVD viewership, revenue, investment, and profitability.¹⁰⁰⁷

a. OVD Viewership

315. The most relevant indicators of the viewing of OVD content appear to be the profile of the OVD audience, the overall volume of OVD shows viewed, subscriberships, and consumer purchase transactions.

316. *Audience.* Available data illustrate a steady increase in the online viewing of video content. A May 2011 Pew survey indicates that 71 percent of online adults use online video sites.¹⁰⁰⁸ The data reveal a considerable increase in comparison to Pew survey results from 2009, when it estimated U.S. online video viewership (e.g., television content, movies) at 32 percent of online users, up from 16 percent of online users in 2007.¹⁰⁰⁹

317. Research firm eMarketer estimates that as of April 2010, 66.7 percent of U.S. Internet users, representing 147.5 million people, watch online video each month. Among adults, 18-34 year olds are most likely to watch video online.¹⁰¹⁰ In 2010, about 86.0 percent of 18-24 year olds and 84.1 percent of adults 25-34 watched online video at least once a month, compared with 43.5 percent of 55-64 year olds and 25.8 percent of adults aged 65 years or older. Among the 147.5 million people watching video online, 24.0 percent are 18-24 years old, 30.7 percent are 25-34 years old, and 26.6 percent are 35-44 years old. EMarketer notes that the availability of free long-form videos, typically videos lasting longer than 10 minutes in their entirety, on Hulu has been a factor in making viewing online video an attractive option to a wider range of demographic groups.¹⁰¹¹

318. Recent data reveal that in 2011 online video viewing has surpassed 50 percent penetration among the total U.S. population.¹⁰¹² Forty-nine percent of U.S. adult online video viewers

¹⁰⁰⁷ Our overall performance analysis include data regarding OVDs that distribute professionally produced as well as user-generated video content. Research, ratings and marketing firms that conduct analyses of consumers' use of OVDs do not generally distinguish between these types of video content provided by the OVDs.

¹⁰⁰⁸ Kathleen Moore, *71% of Online Adults Now Use Video Sharing Sites*, Pew Internet, July 26, 2011, <http://pewinternet.org/Reports/2011/video-sharing-sites.aspx> (visited Mar. 9, 2012). Pew reports that among 18-29 year olds, 92 percent have used video sharing sites; and among 30-49 year olds, 80 percent have used video sharing sites. *Id.* Alternatively, comScore reports that 86 percent of U.S. Internet users view online video. comScore Inc., *comScore Releases July 2011 U.S. Online Video Rankings* (press release), Aug. 22, 2011.

¹⁰⁰⁹ Kristen Purcell, *The State of Online Video*, *Pew Internet & American Life Project*, Pew Internet, June 3, 2010, at 2 & 5, <http://pewinternet.org/Reports/2010/State-of-Online-Video.aspx> (visited Mar. 9, 2012).

¹⁰¹⁰ eMarketer, *Online Video Goes Mainstream*, Apr. 28, 2010, <http://www.emarketer.com/Article.aspx?R=1007664> (visited Mar. 9, 2012).

¹⁰¹¹ *Id.* The Interactive Advertising Bureau (IAB) defines long form video as video content that may be professionally produced or user generated which has a content arc with a beginning, middle and end, and which typically lasts longer than 10 minutes in its entirety. Such content may include professionally produced content from television and cinema that has migrated online, as well as personal videos shared online. See Interactive Advertising Bureau, *Long Form Video Overview*, Sept. 2009, at 4, <http://www.iab.net/media/file/long-form-video-final.pdf> (visited Mar. 9, 2012).

¹⁰¹² eMarketer, *Online Video Viewing Passes 50% of Total US Population*, Dec. 8, 2011, <http://www.public.site1.mirror2.ph1.emarketer.com/Article.aspx?R=1008724> (visited Mar. 9, 2012).

watched full-length television shows on the Internet at least monthly according to this report. Full-length movies are popular fare for web viewing, with some 37 percent of U.S. adult online viewers streaming or downloading at least one feature film monthly in 2011.¹⁰¹³

319. *Hits/Views.*¹⁰¹⁴ ComScore Video Metrix counted 40 billion video views in September 2011,¹⁰¹⁵ compared to Nielsen VideoCensus, which measured the online video market at just over 18 billion streams based on a combination of panel and direct site measurement.¹⁰¹⁶ Among other differences, comScore includes advertising and adult content in its sampling and counts each segment of long-form segmented content as a distinct video stream.

320. Over time, the popularity of the most highly viewed online video websites has demonstrated fluctuation. In 2009, according to comScore, in terms of the number of videos viewed, Hulu was the number two site behind YouTube.¹⁰¹⁷ In 2009, Hulu's views increased by more than 763 million from January to December, accounting for about four percent of the 18.4 billion increase in total online video views during that period.¹⁰¹⁸ ComScore estimates that 923.8 million videos were viewed on Hulu during the month of November 2009, compared with more than 12 billion for YouTube.¹⁰¹⁹ SNL Kagan estimates that in February 2010, Hulu had 39.2 million unique visitors, each watching about an estimated 23.3 videos during that month.¹⁰²⁰ Moreover, according to comScore data, Hulu supported 166.5 million viewing sessions by 26.4 million unique viewers in August, 2011.¹⁰²¹

321. According to the Nielsen Video Census, during November 2011, the top five websites (for professionally produced as well as user-generated videos) based on unique U.S. viewers watching

¹⁰¹³ *Id.*

¹⁰¹⁴ Generally, a "hit" or a "page hit" is the retrieval of an item such as a web page or a graphic from a web server. Thus, if a given web page includes four pictures, images or graphics, that web page equals five hits – one hit for the page itself and four hits for the graphics. Accordingly, hits may be an imprecise measure of actual web traffic. Unique hits count the number of different individuals who have generated at least one hit. Page views are measurements often used in advertising where advertisers need to determine the number of page views a website receives in order to assess where to place their ad content. Generally, a "page view" is a web page that has been viewed by one visitor.

¹⁰¹⁵ comScore, Inc., *comScore Releases September 2011 U.S. Online Video Rankings* (press release), Oct. 21, 2011.

¹⁰¹⁶ Nielsen, *September 2011: Top U.S. Online Destinations for Video*, Nov. 3, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/september-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012); see also *The Economics of Online Video*, AD AGE White Paper at 6.

¹⁰¹⁷ Publicly available data on YouTube hits and views do not distinguish between the number of visitors to the site that view the user-generated content as compared to the site's visitors that view other video content that may be produced professionally. Thus, any data in this Report regarding hits, views or other metrics of consumer engagement with YouTube is assumed to refer to all video content on the website, regardless of whether it is user-generated or professionally produced.

¹⁰¹⁸ Will Richmond, *Why Did Online Video Consumption Spike in 2009*, VideoNuze, Feb. 24, 2012, <http://videonuze.com/blogs/?2010-02-24-Why-Did-Online-Video-Consumption-Spike-in-2009- &id=2446> (visited Mar. 9, 2012) ("2009 Online Spike").

¹⁰¹⁹ AD AGE White Paper at 1, 16-17.

¹⁰²⁰ Liza Castaneda, *With a Profitable Hulu, Why a Subscription Model?*, SNL Kagan, Apr. 26, 2010, <http://www.snl.com/interactives/article.aspx?id=11082288&KPI.T=6>.

¹⁰²¹ comScore, Inc., *comScore Releases August 2011 U.S. Online Video Rankings* (press release), Sept. 22, 2011.

video content were: (1) YouTube (130.8 million unique viewers); (2) Vevo¹⁰²² (42.7 million unique viewers); (3) Yahoo! (34.4 million unique viewers); (4) Facebook (30.3 million unique viewers); and (5) MSN/WindowsLive/Bing (24.6 million unique viewers).¹⁰²³ Viewers spent the most time watching online video content during the month of November 2011 with these five OVDs: (1) Netflix (10 hours, 43 minutes); (2) Hulu (3 hours, 11 minutes); (3) GorillaVid¹⁰²⁴ (3 hours, 11 minutes); (4) YouTube (3 hours, 7 minutes); and (5) Justin.tv¹⁰²⁵ (3 hours).¹⁰²⁶ Data also show that during November 2011, there were 166.9 million unique U.S. video viewers who streamed 21.9 billion videos. During this same one-month period, video viewers spent on average more than five hours watching online video.¹⁰²⁷

322. Analysts use a viewing session metric to gauge users' engagement with the website and/or associated advertisement. A viewing session is defined as a period of time with continuous video viewing followed by a 30-minute period of video inactivity.¹⁰²⁸ The comScore chart below illustrates, among other things, that 178 million U.S. Internet users watched online video content for an average of 16.8 hours per viewer (*i.e.*, 1008.3 minutes/60 minutes), averaging 35 viewing sessions each (*i.e.*, 6,255,493/178,447) in June 2011.¹⁰²⁹

¹⁰²² Vevo is a joint venture between Sony Music Entertainment and Universal Music Group initiated in 2009. Adweek.com indicates that, as of June 2010, Vevo was delivering one billion views globally each month. The site's growth may be attributed to its U.S. Hispanic audience, which in 2010 was estimated to be 7.4 million Hispanic users. See Mike Shields, *Vevo Climbs Web Video Charts*, ADWEEK, July 30, 2010, <http://www.adweek.com/news/technology/vevo-climbs-web-video-charts-102944>.

¹⁰²³ NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012).

¹⁰²⁴ GorillaVid is a file hosting provider that offers online storage, remote backup capacity, uploading and downloading tools. GorillaVid is particularly useful for sending files that may be too large for sending via e-mail. See GorillaVid, *FAQ*, <http://gorillavid.com/faq.html> (visited Feb. 28, 2012).

¹⁰²⁵ Justin.tv is an online destination for watching videos and chatting with friends. See Justin.tv, *Frequently Asked Questions*, <http://www.justin.tv/p/faq> (visited Feb. 28, 2012).

¹⁰²⁶ NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012).

¹⁰²⁷ *Id.*

¹⁰²⁸ comScore, Inc., *comScore Releases June 2011 U.S. Online Video Rankings*, July 15, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/7/comScore_Releases_June_2011_U.S._Online_Video_Rankings (visited Mar. 9, 2012). ComScore reports that the duration of the average online content video was 5.4 minutes and the average online video advertisement was 0.4 minutes long. *Id.*

¹⁰²⁹ *Id.*

Table 23: Top U.S. Online Video Properties Ranked by Unique Views (June 2011)¹⁰³⁰

Property	Total Unique Viewers (in thousands)	Viewing Sessions (in thousands)	Minutes per Viewer
Google Sites ¹⁰³¹	149,281	2,311,116	324.1
VEVO	63,003	399,503	112.0
Yahoo! Sites	52,665	247,834	34.8
Microsoft Sites	50,663	286,892	32.8
Viacom Digital	49,493	274,933	76.8
Facebook.com	47,687	167,137	20.7
AOL, Inc.	43,915	251,987	49.3
Turner Digital	30,063	121,301	46.2
Hulu	26,701	156,939	184.8
Amazon Sites	21,247	43,193	8.3
Total:	178,447	6,255,493	1,008.3

323. Screen Digest estimated that about 11 billion television episodes were viewed via the broadcast networks' own websites in 2010, in contrast to about 19 billion views of television episodes on AOL, MSN, Yahoo!, YouTube and Hulu.¹⁰³² One analyst estimates that YouTube's partnerships with professional content owners, including Disney/ESPN and Univision, enabled it to more than double the number of video streams viewed on its website from 6.3 billion in January 2009 to 13.2 billion in December 2009.¹⁰³³ YouTube recently announced that it "logged 1 trillion hits in 2011" and that it expects to exceed that number in 2012 as politicians and other newsmakers turn to the Internet to distribute web advertisements, speeches and videocasts.¹⁰³⁴ Indeed, one YouTube executive predicts that soon 90 percent of web traffic will be video.¹⁰³⁵

324. From the third quarter of 2008 to the third quarter of 2011, Nielsen reports a gain of 21.7 percent in the number of persons that watch video on the Internet and an increase of 79.5 percent in the amount of time spent watching video online.¹⁰³⁶ Consumer behavior is also reported by age, gender, and

¹⁰³⁰ comScore Video Metrix. These data reflect total U.S. home/work/university locations.

¹⁰³¹ As reflected in this chart, "Google Sites" includes the website YouTube which hosts professionally produced as well as user-generated video content.

¹⁰³² Charlie Jane Anders, *How the Nielsen TV Ratings Work – and What Could Replace Them*, IO9 Backgrounder, Sept. 17, 2010, <http://io9.com/5636210/how-the-nielsen-tv-ratings-work--and-what-could-replace-them> (visited Mar. 9, 2012).

¹⁰³³ 2009 Online Spike.

¹⁰³⁴ Hayley Tsukayama, *YouTube: The Future of Entertainment is on the Web*, WASH. POST, Jan. 12, 2012 (citing comments of Robert Kyncl, YouTube, Vice President of Global Content Partnership, speaking at 2012 International Consumer Electronics Show in Las Vegas).

¹⁰³⁵ *Id.*

¹⁰³⁶ Nielsen State of the Media, *The Cross-Platform Report Quarter 3, 2011 – U.S.*, at 4 ("Nielsen Q3 2011 Cross-Platform Report").

ethnicity in Nielsen's report. Adults aged 25-34 spend the most time each day watching video online (53 minutes).¹⁰³⁷ Hispanics and African Americans spend 34 minutes each day watching video online.¹⁰³⁸

325. *Subscribership.* According to comments filed in this proceeding, Netflix maintains that it is the largest online video subscription service in the United States, with more than 23 million subscribers as of June 2011. It doubled its subscribership from the end of 2009 through the middle of 2010.¹⁰³⁹ According to one report, at the end of the 2011, Netflix had approximately 20 million streaming members in the United States, Canada and Latin America.¹⁰⁴⁰ Hulu Plus supported only 875,000 subscribers as of the second quarter 2011.¹⁰⁴¹ Industry reports indicated that Hulu suffered a loss in subscribers as a result of changes the firm made in 2011 to pricing and other core structural changes.¹⁰⁴²

326. *Consumer Purchase Transactions.* Based on a combination of movie electronic sell-through and Internet VOD revenue, IHS Screen Digest estimates that Apple maintains the lion's share of the consumer transactional market, with Microsoft Zune Video Marketplace, Wal-Mart Vudu, Sony Playstation Store, and Amazon rounding out the top five positions in terms of market share.¹⁰⁴³ IHS notes that iTunes's increase of one percent contrasts with its decline of 12 points from the first half of 2009 to the first half of 2010. Apple's iTunes garnered 64.9 percent of market share in 2010 and 65.8 percent in 2011. The next largest market share was reported by Microsoft's Zune with 18.5 percent in 2010 and 16.2 percent market share in 2011. Wal-Mart's Vudu had 1.0 percent of the market in 2010, and 5.3 percent market share in 2011.¹⁰⁴⁴

b. Revenue

327. There are multiple potential sources of revenue for online video distribution, including subscription fees from consumers; in-video advertising; display advertising around the video; product placement; adveraging.¹⁰⁴⁵ and branded entertainment.¹⁰⁴⁶ We examine each of these in turn below.

¹⁰³⁷ *Id.* at 7.

¹⁰³⁸ *Id.*

¹⁰³⁹ Netflix6/8/11 Comments at 2. In March 2010, Netflix reportedly had 14 million subscribers. See Ed Carson, *Born in the U.S.A: Top 5 American Stocks in IBD 100*, Investors.com, May 17, 2010, <http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/1761-born-in-the-usa-top-5-american-stocks-in-ibd-100> (visited Mar. 9, 2012). Nielsen reports that 89 percent of Hulu users watch video programming using a computer and 20 percent of Hulu users watch video programming using a computer connected to a television. Nielsen, *State of the Media Report, Consumer Usage Report 2011*, at 3 ("Nielsen 2011 Consumer Usage Report").

¹⁰⁴⁰ Netflix, Inc., *Netflix and Disney-ABC Television Group Announce Extension of Existing Licensing Agreement to Stream TV Shows* (press release), Oct. 31, 2011.

¹⁰⁴¹ Vision2mobile Special Report, *New Television Viewing Models*, Aug. 2011, at 20.

¹⁰⁴² See Christina M. Mitchell, *Yahoo, Netflix a Match?*, SNL Marketweek, Jan. 6, 2012. However, Netflix has reported that domestic streaming and DVD gross cancellations have steadily declined during October and November 2011. See Haseeb Ali, *Netflix Provides Negative 2012 Outlook: Streaming, DVD Cancellations Decline*, SNL Kagan, Nov. 23, 2011.

¹⁰⁴³ IHS, *iTunes Gains Share in Online Movies in First Half of 2011* (press release), Aug. 22, 2011.

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ Adveraging, a type of niche marketing, is the practice of inserting paid advertisements in a video game.

¹⁰⁴⁶ AD AGE White Paper at 4.

328. *Advertising.* Advertising is included with a variety of online video content formats, including television shows, news, short clips, and sports content.¹⁰⁴⁷ Media buyers are purchasing online video advertising often as an add-on component to traditional television ad purchases. Some experts speculate that, even though the television advertising market is still far and away the dominant media venue for advertising,¹⁰⁴⁸ it is a marketplace that has likely peaked in terms of the size of the viewing audience, while the online viewing audience is expected to continue growing.¹⁰⁴⁹ Additionally, advertisers value online video ads because the system allows advertisers to gather information and details about consumer engagement, time spent with the brand, and sharing that are not always readily available with other sources of advertising.¹⁰⁵⁰

329. The Interactive Advertising Bureau (IAB) reports that in the 3rd quarter of 2011 Internet advertising reached \$7.88 billion, a 22 percent increase over the same period in 2010.¹⁰⁵¹ EMarketer reports that total U.S. online ad spending amounted to \$32 billion in 2011, and that it expects online ad spending to grow in 2012 by potentially as much as 23 percent to \$39.5 billion.¹⁰⁵² Screen Digest estimated that the four major broadcast networks earned about 50 percent of the total \$448 million in advertising-supported online video advertising dollars in the United States in 2008, and an additional 25 percent went to the websites of the cable networks.¹⁰⁵³

330. ComScore estimates that U.S. Internet users saw 5.3 billion video advertisements in June 2011.¹⁰⁵⁴ Additionally, slightly more than two billion total ad minutes were viewed during this same time period, with each unique viewer exposed to approximately 35 ads each. This online video advertising content reached 49.2 percent of the U.S. population. ComScore includes in this category streaming video advertisements only, not other types of video monetization such as overlays, branded players, matching

¹⁰⁴⁷ See, e.g., Pete Barlas, *Video Ad Spending Finally Getting Into the Picture*, INVESTOR'S BUSINESS DAILY, May 14, 2010.

¹⁰⁴⁸ In 2009, advertisers spent \$908 million on U.S. online video advertising compared to the \$68.9 billion spent on U.S. television advertising during that same period. See *id.*

¹⁰⁴⁹ Advertising executive Matt Wasserlauf, of online ad agency BBE, has indicated that, "TV viewership has leveled off and viewership is growing in online video." See *id.* Sports programming promises to become a growth sector in online video. NBC announced that the 2012 Super Bowl would be streamed free of charge over the Internet for the first time and would also be available on Verizon's Mobile NFL Wireless apps. See Priya Kanwar, *Watch Super Bowl XLVI 2012 and Other Sports Live Streaming Free on Mobile Phones*, Technorati, Jan. 9, 2012, <http://technorati.com/technology/article/watch-super-bowl-xlvi-2012-and/> (visited Mar. 9, 2012).

¹⁰⁵⁰ See, e.g., Jon Erickson, *Measuring the Total Economic Impact of Customer Engagement*, Forrester Consulting, Sept. 2008; see also *Marketing and Advertising Using New Media*, Baruch New Media, Feb. 27, 2012, http://baruchnewmedia.com/wiki/Marketing_and_Advertising_using_New_Media (visited Mar. 9, 2012).

¹⁰⁵¹ Interactive Advertising Bureau, *Q3 '11 Internet Advertising Revenues Up 22% from Year Ago, Climb to Nearly \$7.9 Billion, According to IAB and PwC* (press release), Nov. 30, 2011.

¹⁰⁵² eMarketer.com, *U.S. Online Ad Spend to Close in on \$40 Billion*, Jan. 19, 2012, <http://www.emarketerl.com/Article.aspx?id=1008783&R=1008783> (visited Mar. 9, 2012).

¹⁰⁵³ IBE, *Major U.S. Broadcaster-Backed Online Networks Claim Lion's Share of Free Online TV*, July 9, 2009, <http://www.ibeweb.com/ibe-news-major-us-broadcaster-backed-online-networks-claim-lions-share-free-online-tv> (visited Mar. 9, 2012).

¹⁰⁵⁴ comScore, Inc., *comScore Releases June 2011 U.S. Online Video Rankings*, July 15, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/7/comScore_Releases_June_2011_U.S._Online_Video_Rankings (visited Mar. 9, 2012). In Table 24, for example, video viewers watched 424 million minutes in the month of June 2011, according to the chart for total U.S. home/work/university locations.

banner ads, or homepage ads.¹⁰⁵⁵ The comScore data also includes several video advertising networks, such as Tremor Media Video Network, BrightRoll Video Network, Specific Media, Undertone and SpotXchange Video Ad Network as well as Adap.tv, a video advertising exchange.¹⁰⁵⁶ The leading five websites and advertising networks for video ads viewed during June 2011 were: (1) Hulu, one billion ads viewed; (2) Tremor Media Video Network, 753 million ads viewed; (3) Adap.tv, 677 million ads viewed; (4) BrightRoll Video Network, 628 million ads viewed; and (5) Specific Media, 421 million ads viewed.¹⁰⁵⁷

Table 24: Top U.S. Online Video Properties by Video Ads Viewed (June 2011)¹⁰⁵⁸

Property	Video Ads (in thousands)	Total Ad Minutes (millions/month)	Frequency (Ads per Viewer)	Reach of Total U.S. Population (%)
Hulu	1,001,736	424	38.8	8.6%
Tremor Media Video Network	753,034	429	12.1	20.7%
Adap.tv	677,708	386	11.0	20.5%
BrightRoll Video Network	628,600	396	9.5	21.9%
Specific Media	421,722	214	6.8	20.4%
Undertone	332,597	171	13.2	8.3%
SpotXchange Video Ad Network	281,859	171	7.8	11.9%
Viacom Digital	275,230	134	10.4	8.8%
Microsoft Sites	226,951	125	9.2	8.2%
AOL, Inc.	217,347	85	7.3	9.9%
Total:	5,286,917	2,286	35.6	49.2%

331. Although its revenues declined in the early part of the studied period, the availability of professional content has enabled YouTube to win back advertisers. YouTube has indicated that, as of January 2010, it sells ads for more than 10 percent of U.S. video streams, up from six percent in January 2009. In May 2010 it reported that it had increased the number of advertisers using display ads by a factor of ten. YouTube typically charges a CPM of \$15.¹⁰⁵⁹ For its music channel, Vevo, it charges a CPM ranging from \$25 - \$35. Branded sites, such as ESPN's channel, can earn a CPM of \$22. YouTube can earn about \$400,000 per day from advertisements on its home page, and generates about \$10 million per month from advertising on its home page alone.¹⁰⁶⁰

332. Hulu's free online service generates revenue from advertising sales based on the number of consumers that view ad impressions on Hulu.com; from video streams; from its distribution partners'

¹⁰⁵⁵ *Id.*

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ comScore Video Metrix.

¹⁰⁵⁹ Cost per mille (CPM), also referred to as cost per thousand impressions, is a common advertising model. See *supra*, ¶ 192.

¹⁰⁶⁰ AD AGE White Paper at 9.

websites; and from the embeddable Hulu video player.¹⁰⁶¹ Hulu Plus generates revenues from advertising as well as its subscription fees. Hulu currently partners with more than 625 advertisers.¹⁰⁶² The process by which the networks sell inventory within the programs they distribute on Hulu, however, differs substantially from their traditional process. For example, broadcast networks typically prohibit Hulu from selling specific shows to advertisers. Instead, Hulu offers advertisers access to viewers across many shows, *i.e.*, “run-of-schedule.”¹⁰⁶³ Because Hulu cannot guarantee placement in specific shows, it charges lower CPMs than the broadcast network websites (*e.g.*, an average \$35 CPM versus \$45 for ABC.com).¹⁰⁶⁴

333. The broadcast networks, which are equity owners of Hulu, receive 70 percent of the advertising revenue sold on their programs,¹⁰⁶⁵ while other program suppliers receive between 50 percent and 70 percent.¹⁰⁶⁶ Press reports have estimated that Hulu sells out about 50 percent of its inventory.¹⁰⁶⁷ In 2009, Hulu earned \$100 million, and was profitable during the fourth quarter of 2009 as well as the first quarter of 2010.¹⁰⁶⁸

c. Investment

334. As a nascent business model in the provision of video content, the OVD industry’s investment perspective is defined by new content and distribution deals and transactions. As previously discussed, OVDs are entering new partnerships and innovating in products and services in order to retain and attract consumers.¹⁰⁶⁹ Whether it be the joint venture between Redbox and Verizon or YouTube’s partnership with *The Wall Street Journal* and others to create 100 new linear channels, these deals, transactions, and partnerships, as much as any other capital expenditures, demonstrate the investments that companies are making to foster the growth of the OVD sector.

¹⁰⁶¹ See Hulu FAQ.

¹⁰⁶² See About Hulu.

¹⁰⁶³ Hulu divides its advertising into three formats. As part of its standard ad formats, Hulu sells spots in 15- and 30- second increments, which run before, during, or after an ad break. Other standard ad formats include overlay brand bars, which appear over the content at the bottom of the video, and include a logo and targeted message that enable the user to play a full ad, and overlay logo bugs, which appear in the bottom right corner of the screen that users can opt in to play the full video ad. See *id.*

¹⁰⁶⁴ See AD AGE White Paper at 7 & Chart 7 at 12. This compares with a CPM of less than \$20 for a typical broadcast network viewed on a television set via a broadcast station or MVPD. Hulu typically limits sponsorship to one advertiser per episode, which commands ad rates that are up to twice as high for the same ad per thousand viewers than broadcast rates.

¹⁰⁶⁵ AD AGE White Paper at 8-9.

¹⁰⁶⁶ Brian Stelter and Brad Stone, *Successes (and Some Growing Pains) at Hulu*, N.Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/04/01/technology/01hulu.html?dbk> (visited Mar. 9, 2012) (“Hulu Successes”).

¹⁰⁶⁷ Michael Learmonth, *Hulu’s a Towering Success – Just Not Financially*, ADVERTISING AGE, Mar. 29, 2010, http://adage.com/digital/article?article_id=143011 (visited Mar. 9, 2012); see also Brian Morrissey, *Hulu Makes Inroads*, ADWEEK DIGITAL, Oct. 15, 2009, http://www.adweek.com/aw/content_display/news_digital_e31505f51deede76b4275ed6041e29e5fed (visited Mar. 9, 2012).

¹⁰⁶⁸ Hulu Successes.

¹⁰⁶⁹ See, *e.g.*, *supra*, ¶ 304.

d. Profitability

335. Many of the prominent OVDs are subsidiaries or operations within a larger business. Because the assets, liabilities, revenues and expenses of the parent company and the subsidiaries are often presented in consolidated financial statements that are reflective of the total resources of the combined entity rather than any of its specific component parts, assessing the profitability of a subsidiary of a larger enterprise is extremely difficult. Even with respect to the standalone OVDs, we either do not have access to their financial information or, if we do, the publicly available information does not include the specifics that are necessary to analyze the OVD's profitability. Thus, for this Report, we are unable to conduct an analysis of the profitability of OVDs. As OVDs continue to mature and evolve, we anticipate that future public reporting may include data on profitability and other metrics to assess the financial viability of this segment of the delivered video market.

5. Consumer Behavior

336. In this section of the Report, we consider how trends in consumer behavior affect the products and services of OVD providers of delivered video content and other categories of video content. Recent data illustrate which consumers are heavy OVD users and how that use affects other types of video content services.

337. Nielsen's *Cross-Platform Report* indicates that, unlike the near-universality of television watching, viewership of streaming video content is highly concentrated -- 83 percent of all streaming takes place among the top fifth of consumers who stream.¹⁰⁷⁰ Males aged 18 – 49 years old spent the most time per month viewing Internet video content (six hours, 38 minutes per month) during the second quarter of 2011. Males aged 2 and older spent the second highest amount of time per month viewing Internet video content (five hours, 5 minutes per month) during the same quarter. Females aged 18 – 49 years old spent the third highest amount of time per month viewing Internet video content (four hours, 47 minutes per month) during the same quarter.¹⁰⁷¹ Asian Americans spent the largest amount of time during the second quarter of 2011 watching video content on the Internet (nine hours, 11 minutes per month); followed by Hispanics (six hours, 15 minutes per month); African Americans (five hours, 58 minutes per month) and Whites (three hours, 50 minutes per month).¹⁰⁷² Moreover, Americans are increasingly turning to mobile devices to access video content. Nielsen reports an increase of 36.9 percent in mobile video users from third quarter 2010 to third quarter 2011.¹⁰⁷³

338. In its *2011 Consumer Usage Report*, Nielsen describes the primary methods Americans use to watch television or video content. Traditional television is the dominant device for video consumption as 288 million viewers ages two and up use this method.¹⁰⁷⁴ The data also show that other methods register far behind traditional television in how consumers watch video: Internet, 143 million;

¹⁰⁷⁰ Nielsen State of the Media, *The Cross-Platform Report Quarter 2, 2011*, at 2.

¹⁰⁷¹ *Id.* at 6.

¹⁰⁷² *Id.* at 7. Nielsen's 2011 annual data indicates that among consumers ages 13 and over, 232 million use a mobile phone; 211 million use online; 192 million use a personal computer or laptop at home or at work; and 116 million use mobile web. Nielsen 2011 Consumer Usage Report at 1.

¹⁰⁷³ Nielsen Q3 2011 Cross-Platform Report at 5.

¹⁰⁷⁴ Nielsen 2011 Consumer Usage Report at 2.

time-shifted television, 111 million;¹⁰⁷⁵ and mobile phone, 30 million.¹⁰⁷⁶

339. For years, viewers switched from over-the-air broadcast television to subscribe to cable (and sometimes back again), and more recently, switched between MVPDs to the extent available. The growth and availability of OVDs adds another layer of choice that can be a complement or a substitute.¹⁰⁷⁷ Many consumers of video programming maintain multiple relations with providers of such services, and can easily shift their spending from one to another.¹⁰⁷⁸

340. The record in this proceeding and recent data are mixed regarding the effect of OVDs on the market for the delivery of video programming. Driving the debate are competing explanations for the recent relative drop-off in MVPD video subscribership, the extent of which itself is unclear.¹⁰⁷⁹ However, MVPDs increasingly acknowledge that consumers will find and watch content that appeals to them even if such content is not provided on major broadcast or cable networks or carried on cable television.¹⁰⁸⁰ They recognize that the marketplace is already providing a range of alternative equipment and technology to stream content directly from the Internet or from a networked computer to television sets.¹⁰⁸¹ Many of these devices, which are used with television sets for other purposes such as gaming devices, DVRs, and Blu-ray players, enable consumers to find and stream Internet content to their sets without requiring the use of a computer.¹⁰⁸² And, television sets are increasingly incorporating such Internet access. Sales of such sets are rapidly increasing and are projected to exceed 118 million only a few short years after their introduction. Also, iPads and other tablets have emerged as highly popular alternatives for watching online video. Moreover, consumers now have wider choice among standalone devices dedicated to receiving Internet content on television sets. For example, VeeBeam uses a wireless USB point-to-point connection between a laptop and a television, which enables consumers to transmit anything that is on

¹⁰⁷⁵ The proportion of viewers using time-shifted television grew 11 percent since the second quarter of 2010 according to Nielsen's data. *Id.*

¹⁰⁷⁶ *Id.* Regarding device ownership, Nielsen reports that 290 million people own at least one television; 253 million own a DVD player; 162 million own a video game console; 145 million have digital cable; 129 million have a DVR (digital video recorder) and 95 million have satellite television. *Id.* at 1.

¹⁰⁷⁷ Public Knowledge 6/8/11 Comments at 6 ("in practice online video remains complementary to traditional MVPD or broadcast programming, for most viewers"); *id.* at 10 ("whether OVDs compete with MVPDs is a complex question. In some ways they do and in other ways they do not."). See also John Hudson, *Cable is Still King, Says Netflix CEO*, *The Atlantic Wire*, June 1, 2011 (citing Netflix CEO Reed Hastings that "[s]tatistically, no one is dropping cable"), <http://www.theatlanticwire.com/technology/2011/06/cable-still-king-says-netflix-ceo/38369/> (visited Mar. 9, 2012).

¹⁰⁷⁸ See Netflix 2010 Form 10-K at 1-2.

¹⁰⁷⁹ See George Szalai, *Analyst: Pay TV Industry to Lose 200,000 Subscribers in 2012*, *THE HOLLYWOOD REPORTER*, Nov. 28, 2011 (citing Credit Suisse analyst Stefan Anninger), <http://www.hollywoodreporter.com/news/analyst-pay-tv-industry-lose-266589> (visited Mar. 9, 2012); see also Bloomberg News, *Comcast Profit Advances 16% as Video-Subscriber Losses Slow*, *L.A. TIMES*, Aug. 3, 2011 (citing Craig Moffett of Sanford C. Bernstein & Co.). See *supra*, ¶ 142 (from 2006 through 2010, cable MVPD video penetration decreased from 53.8 percent of all homes passed by cable MVPDs to 46.5 percent).

¹⁰⁸⁰ NCTA 6/8/11 Comments at 20.

¹⁰⁸¹ This is sometimes referred to as over-the-top viewing. Nielsen describes over-the-top as the use of devices that piggyback on normal distribution channels (cable, satellite, etc.) to pull content directly from the Internet and deliver it to the television set. The equipment can include consumer devices such as DVD players, video game consoles and web-enabled televisions. Nielsen Cross-Platform Report Q3 2011, *Glossary*.

¹⁰⁸² NCTA 6/8/11 Comments at 24.

their computer screen wirelessly to their television set.¹⁰⁸³ Likewise, other technologies, like the Google TV and Roku devices, provide direct links to major sources of Internet content (such as Hulu, Netflix and Amazon).¹⁰⁸⁴

341. Some reports indicate that OVD users are beginning to “cut the cord” and drop their MVPD service in favor of OVD or a combination of OVD and over-the-air television.¹⁰⁸⁵ One survey contends that nine percent of respondents have already cancelled their cable subscriptions and an additional 11 percent have stated that they are considering doing so.¹⁰⁸⁶ Cord-cutters, as this group is referred to, tend to be younger consumers, 23–28 years old. Thirteen percent of GenXers indicate that they were considering cutting the cord and seven percent of baby boomers state that they have also considered it.¹⁰⁸⁷ Twenty-two percent of the survey respondents indicated that they had watched their “favorite TV show” on a free online video site, and 21 percent stated that they had viewed that same show on its own video site.¹⁰⁸⁸ Additionally, according to one estimate, 13 percent of consumers with a broadband connection “cord-shaved” in the past year.¹⁰⁸⁹ These data notwithstanding, there are also indications that increased viewing of video content delivered over the Internet does not necessarily

¹⁰⁸³ *Id.*

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ See Ian Olgeirson and Deana Myers, *Over-the-top Substitution Forecast to Erode Multichannel Penetrations*, SNL Kagan, July 15, 2011 (estimating that nearly 4 percent of occupied U.S. households will employ Internet video in lieu of subscribing to a multichannel video package at year-end 2011); see also Terrance O’Brien, *Netflix Users More Likely to Cut the Cable Cord*, Jan. 15, 2011, <http://www.switched.com/2011/01/05/netflix-users-more-likely-to-cut-the-cable-cord/> (citing a JP Morgan survey that 28 percent of cable subscribers would consider cutting the cord, but that 47 percent of Netflix customers would do so) (visited Mar. 9, 2012); see also Andy Plessner, *Roku Owners are ‘Cutting the Cord’ in Substantial Numbers*, Beet.TV, May 10, 2011, http://www.huffingtonpost.com/andy-plessner/roku-owners-are-cutting-t-b_860280.html (citing interview with Jim Funk of Roku that “[s]ome 15-20 percent of Roku owners are cancelling their cable or satellite services agreement and are relying solely on a broadband connection to get their television programming”) (visited Mar. 9, 2012).

¹⁰⁸⁶ Ryan Lawler, *Deloitte: 9% Have Cut Cable, Another 11% Are Considering It*, GigaOm, Jan. 4, 2012, <http://gigaom.com/video/deloitte-cord-cutting/> (“GigaOm Deloitte Report”); see also *State of the Media Democracy Survey, Sixth Edition*, http://www.deloitte.com/view/en_US/us/Industries/media-entertainment-media-democracy-survey-sixth/index.html?id=us_furl_tmt_somd_010312 (visited Mar. 9, 2012).

¹⁰⁸⁷ GigaOm Deloitte Report.

¹⁰⁸⁸ *Id.*

¹⁰⁸⁹ Cord-shaving generally refers to a downgrading of pay video services from the subscriber’s MVPD. See Parks Associates, *High-speed Broadband May Accelerate Cord Cutting*, Aug. 24, 2011, <http://www.parksassociates.com/blog/article/high-speed-broadband-may-accelerate-cord-cutting> (visited Mar. 9, 2012). See also, e.g., Brian Santo, *A Shave and a Service Cut – Two bits*, CED, Oct. 26, 2011, <http://www.cedmagazine.com/blogs/2011/10/a-shave-and-a-service-cut-%F2%80%93-two-bits> (visited Mar. 9, 2012). One commenter explains that viewing Internet content on a television set can be relatively simple, as “simple as connecting a cable between the HDMI output of a computer and the HDMI input of a television set” though not many consumers may be inclined to view television programming in this manner. Such direct PC-to-TV connections are deemed infrequent and restricted to tech-savvy consumers, with approximately one-third of broadband users connecting a PC to their TV to enjoy PC or online video on “the big screen” at least once a year. See NCTA 6/8/11 Comments at 23–24. See also *id.* at 24–5 (citing The Diffusion Group, *PC-to-TV Connectivity More Widespread Than Perceived*, Mar. 1, 2011, <http://tdgresearch.com/blogs/press-releases/archive/2011/03/01/pc-to-tv-connectivity-more-widespread-than-perceived.aspx>).

translate into decreased MVPD subscriptions.¹⁰⁹⁰ In that regard, a recent survey indicates that, while more than 50 percent of online consumers watch television shows and movies online at least occasionally, there is still growth in their use of VOD, DVR, and other MVPD-provided options and that, surprisingly, the more alternative platforms consumers use, the more they tend to spend on traditional television subscription services.¹⁰⁹¹

342. Although OVDs have begun to make inroads against traditional distributors, online viewership is still dwarfed by its traditional distributors.¹⁰⁹² According to Nielsen, Americans watched on average 32 hours and 47 minutes a week of traditional television and two hours and 21 minutes a week of time-shifted television, compared to 27 minutes a week of video on the Internet, and only 7 minutes a week of video on a mobile phone.¹⁰⁹³ Screen Digest estimated that all of the a la carte sales of television shows from Apple, Amazon, and other OVD competitors would amount to only \$407 million in 2010, compared to what PriceWaterhouseCoopers estimates would be the \$143 billion spent on television advertising and subscriptions.¹⁰⁹⁴

IV. RURAL VERSUS URBAN COMPARISONS

343. In this portion of the Report, we compare video programming competition in rural and urban areas.¹⁰⁹⁵ We discuss this issue for each of the three categories of video programming discussed above – MVPD, broadcast, and OVD.

344. The availability of satellite-delivered video programming in rural and underserved areas is a goal of Section 628(a) of the Act.¹⁰⁹⁶ In the *15th Mobile Wireless Report*, the Commission adopted a “baseline” definition of the term “rural” to mean a county with a population density of 100 persons or fewer per square mile.¹⁰⁹⁷ Under this definition, roughly 61 million people, or 21 percent of the U.S. population, live in rural counties. These counties comprise 3.1 million square miles, or 86 percent of the geographic area of the United States.¹⁰⁹⁸ We adopt this definition for our analysis.¹⁰⁹⁹ Because data on the delivery of video programming are not generally available in a manner that enables us to aggregate

¹⁰⁹⁰ Franks N. Magid Associates, Inc., *Magid Study: Consumers More Connected to TV Sets Than Ever - TV Purchase Intentions Climb to Pre-Recession Levels, Demand for Smart TVs Impressive* (press release), Nov. 22, 2011. Magid surveyed a nationally representative sample of 1,530 online consumers ages 12 years and older in October 2011 in order to track consumer trends in regards to television, HD TV, 3-D TV, online video and mobile video viewing for this annual survey.

¹⁰⁹¹ *Id.*

¹⁰⁹² For example, Netflix identifies its principal competitors as including MVPDs with TV Everywhere and VOD content; Internet movie and television content providers; DVD rental outlets and kiosk services; and entertainment video retailers. See Netflix 2010 10-K at 2.

¹⁰⁹³ Nielsen Cross-Platform Report Q2 2011 at 5.

¹⁰⁹⁴ Fowler & Schechner at B1.

¹⁰⁹⁵ See *Further Notice*, 26 FCC Red at 14113-15, ¶¶ 56-58.

¹⁰⁹⁶ 47 U.S.C. § 548(a) (“The purpose of this section is . . . to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming . . .”).

¹⁰⁹⁷ *15th Mobile Wireless Report*, 26 FCC Red at 9878, ¶ 378.

¹⁰⁹⁸ See *id.* at 9878, ¶ 379. These figures are based on 2000 Census data. See *id.* at 9880, n. 1126.

¹⁰⁹⁹ See *Further Notice*, 26 FCC Red at 14113-14, ¶ 56. We received no comments on our proposal to use the same definition as that used in the Wireless Competition Report, *supra*, n. 1097.

county data by population density, we rely on available evidence provided in the record or from other sources to compare alternatives for the delivery of video programming between rural and urban areas.

A. MVPDs

345. MVPDs serving rural and smaller markets provide a range of services to millions of households, including video via coaxial cable and Internet Protocol television (“IPTV”), digital telephony, and broadband Internet access.¹¹⁰⁰ ACA reports that its membership of nearly 900 cable operators provides these services to 7.6 million households and businesses,¹¹⁰¹ with more than half of its members serving fewer than 1,000 subscribers.¹¹⁰² Many rural MVPDs indicate that they face unique challenges in offering competitive video, voice, and broadband services due to the cost of system build-outs and upgrades in less densely populated areas with a limited consumer base.¹¹⁰³ For instance, NTCA, a trade association representing more than 580 rural telecommunications providers, states that 252 of its members offered cable service in 2010, a decrease from 2007 when 276 members offered this service.¹¹⁰⁴ In addition, NTCA notes a decline in the number of its members selling DBS service. In 2007, 106 of its members sold DBS service, and in 2010, the figure dropped to 66.¹¹⁰⁵

346. NTCA has, on the other hand, seen a rise in the number of its members delivering IPTV – from 61 members in 2007 to 159 in 2010.¹¹⁰⁶ NTCA and other rural associations predict this number is likely to increase as the number of members offering broadband service rises.¹¹⁰⁷ Overall, NTCA reports that its members are facing increasing competition in the delivery of video services. A 2009 informal NTCA poll indicated that 58 percent of respondents reported facing competition from a cable operator, 92

¹¹⁰⁰ See ACA 6/8/11 Comments at 1; NTCA 5/20/09 Comments at 1-2.

¹¹⁰¹ See ACA 6/8/11 Comments at 1.

¹¹⁰² See ACA 7/29/09 Comments at 3.

¹¹⁰³ See, e.g., ACA 6/8/11 Comments at 2. OPASTCO and NTCA also explain that many rural carriers need to share headends to provide video services given the substantial financial cost of entering the video services market. They claim that this business model is threatened, however, by the practice of some programming networks to deny cable or IPTV systems that share headends access to programming. See OPASTCO 7/29/09 Comments at 20-21; NTCA 5/20/09 Comments at 11-12. In addition, OPASTCO claims that some networks have denied rural MVPDs using an IPTV platform access to their content or imposed unnecessary expenses based on perceived security concerns. See OPASTCO 7/29/09 Comments at 21. Using U.S. Census data as of 2000, the California PUC further reports that a significantly higher percentage of California’s rural census blocks are either unserved or served by a single state video franchisee or locally franchised affiliate. In comparison, over 86 percent of California’s census blocks with two or more providers are urban. See California PUC 6/8/11 Comments at 1-4.

¹¹⁰⁴ See Rural Associations 6/8/11 Comments at 1 nn. 1 & 2. These results are based on a 2010 survey of NTCA’s membership. See *id.* at 2.

¹¹⁰⁵ See *id.*

¹¹⁰⁶ See *id.*

¹¹⁰⁷ See *id.* The Rural Associations view broadband and the provision of video service as key components to their long term viability. See *id.* at 2-3. An NTCA 2008 survey on the offering of broadband services (“2008 Broadband Study”) indicated that rural telcos saw video as a “must have offering” for success in a competitive market. Almost two-thirds of respondents already provided video to customers – an increase from 63 percent in 2007 and 42 percent in 2005. Almost 80 percent of rural telcos with future video plans aimed to offer IPTV service. See NTCA 5/20/09 Comments at 3.

percent faced competition from a satellite provider, and six percent faced competition from an IPTV provider.¹¹⁰⁸

347. Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), a trade association representing 520 small incumbent LECs serving rural America, found in a 2009 survey of its members that 74 percent of respondents offered subscription video service.¹¹⁰⁹ Almost half of the respondents who did not offer video service indicated that they were likely to offer it in the near future.¹¹¹⁰ Sixty-nine percent of survey respondents also indicated that they faced direct competition from one or more non-satellite video providers.¹¹¹¹ Among these respondents, 22 percent indicated that they competed with two or three non-satellite video providers.¹¹¹²

348. Nielsen finds that rural counties tend to rely on DBS more than urban counties for MVPD services. Nielsen categorizes counties based on Census household counts and proximity to metropolitan areas. It estimates that, as of the end of 2010, the distribution of television households was as follows: 40 percent in highly urbanized counties belonging to the 21 largest Metropolitan Statistical Areas (A Counties); 31 percent in counties with more than 85,000 households that are not defined as A Counties (B Counties); and 29 percent in counties with fewer than 85,000 households (C and D Counties).¹¹¹³ According to Nielsen's 2011 estimates, in A Counties, 69 percent of television households relied on cable service and 23 percent of television households relied on DBS. Sixty-four percent of television households in B Counties subscribed to cable and 26 percent subscribed to DBS. In C and D counties, 48 percent of television households relied on cable service, compared with 42 percent who subscribed to DBS.¹¹¹⁴

349. One of the biggest challenges small and rural MVPDs report facing is access to video content at competitive rates. These MVPDs indicate that a failure to acquire programming at competitive prices and terms reduces their ability to provide consumers with competitive and affordable video service offerings meeting the economic needs of the community.¹¹¹⁵ For example, several small and rural MVPDs contend that, to gain carriage rights to the most popular networks, they are required by the owners of those networks to carry less-popular co-owned networks on an expanded basic tier.¹¹¹⁶ The

¹¹⁰⁸ See NTCA 5/20/09 Comments at 3.

¹¹⁰⁹ See OPASTCO 7/29/09 Comments at 1, 3.

¹¹¹⁰ See *id.*

¹¹¹¹ See *id.* at 4.

¹¹¹² See *id.*

¹¹¹³ See Nielsen 2010 & 2011 Television Audience Report at 6. Nielsen classifies C Counties as counties not defined as A or B counties that have more than 20,000 households or are in Consolidated Metropolitan Statistical Areas or Metropolitan Statistical Areas with more than 20,000 households. Nielsen classifies D counties as all counties not classified as A, B, or C counties; they are very rural. See Nielsen Media Research, *Glossary of Media Terms* (defining Nielsen's classifications of A, B, C, and D counties), <http://www.nielsenmedia.com/glossary/> (visited Mar. 21, 2012).

¹¹¹⁴ See Nielsen 2010 & 2011 Television Audience Report at 6.

¹¹¹⁵ See, e.g., Rural Associations 6/8/11 Comments at 5-9; ACA 6/8/11 Comments at 5-10; Rural Telcos 6/8/11 Comments at 3-13; SureWest 7/8/11 Reply at 4-5; NTCA 5/20/09 Comments at 6; OPASTCO 7/29/09 Comments at 10-13.

¹¹¹⁶ See, e.g., Rural Telcos 6/8/11 Comments at 3-4, 8; ACA 5/20/09 Comments at 9. The Rural Telcos also indicate that failure to accept such an agreement results in pricing penalties, and that some programmers now force them to carry HD and 3D channels. See Rural Telcos 6/8/11 Comments at 4, 8.

rural MVPDs claim that these program “tying” and tiering requirements impose on them unreasonably high wholesale costs for programming in comparison to incumbent cable operators, which they then pass on to consumers.¹¹¹⁷ ACA suggests that small and medium-sized MVPDs pay 30 percent more for national cable network programming than major MSOs.¹¹¹⁸

350. In addition, several small and rural MVPDs contend that some programmers condition access to traditional cable networks, such as ESPN, on payment for distribution of the online version of the network, such as ESPN3.¹¹¹⁹ These MVPDs maintain that such programmers require the cost of the online versions of the networks to be bundled into basic broadband packages.¹¹²⁰ They state that the networks charge subscriber fees on the basis of the number of broadband subscribers for the online versions of the networks as well as the number of video subscribers for linear distribution.¹¹²¹ These MVPDs argue that this practice forces them to either absorb the additional cost or raise end-user rates for broadband.¹¹²² Small and rural MVPDs also report having to promote programmers’ websites to broadband customers outside of their video service territory.¹¹²³

351. Several video programmers argue that the programming market is extremely competitive, which has lead to a diverse array of programming choices for consumers.¹¹²⁴ In particular, these programmers suggest no program supplier has market power thereby allowing new programmers and networks to enter the market freely.¹¹²⁵ Additionally, Time Warner and Fox argue that bundling is a prevalent practice in the American economy and provides numerous benefits, such as lowering transaction and production costs. They also note many programmers provide MVPDs with the opportunity to purchase networks on an individual basis.¹¹²⁶ Similarly, Viacom claims that it does not compel any cable operator to negotiate for carriage of multiple networks nor require any cable system to

¹¹¹⁷ See Rural Associations 6/8/11 Comments at 5-6; Rural Telcos 6/8/11 Comments at 9-11. See also SureWest 7/8/11 Reply at 5-7. The Rural Telcos also note that these practices preclude them from promoting the lowest basic service package. For example, NRTC reports that its members must sell their expanded basic packages, which at a minimum contain over 70 channels, at a retail price averaging \$50-\$60 per month. Comparatively, NRTC contends that incumbent rural cable systems not burdened with tying or tiering requirements may carry about 50 channels at \$35 per month per subscriber. See Rural Telcos 6/8/11 Comments at 10. The Rural Telcos further argue that forced tying and tiering requirements prevent the carriage of independent channels on an expanded basic tier. See *id.* at 11.

¹¹¹⁸ See ACA 6/8/11 Comments at 9. OPASTCO further asserts that rural MVPDs lack leverage in negotiating for programming due to mandatory non-disclosure agreements between video programmers and rural MVPDs since these agreements conceal the true market value for programming. See OPASTCO 7/29/09 Comments at 18-20.

¹¹¹⁹ See Rural Telcos 6/8/11 Comments at 11-13; ACA 8/28/09 Reply at 9-11.

¹¹²⁰ See OPASTCO 7/29/09 Comments 13-15; NTCA 5/20/09 Comments at 5-6.

¹¹²¹ See OPASTCO 7/29/09 Comments 13-15.

¹¹²² See, e.g., Rural Telcos 6/8/11 Comments at 11-13; Rural Associations 6/8/11 Comments at 7-8; OPASTCO 7/29/09 Comments at 13-15.

¹¹²³ See Rural Association 6/8/11 Comments at 7; OPASTCO 7/29/09 Comments at 13.

¹¹²⁴ See, e.g., Fox Entertainment Group, Inc. & Fox Television Holdings, Inc. Comments, MB Docket No. 07-198 (filed Jan. 4, 2008) at 19-21 (“Fox 07-198 Comments”); Viacom Inc. Comments, MB Docket No. 07-198 (filed Jan. 4, 2008) at 4-8 (“Viacom 07-198 Comments”); NBC Universal, Inc. & NBC Telemundo License Co. Comments, MB Docket 07-198 (“NBC 07-198 Comments”) at 42-45.

¹¹²⁵ See Fox 07-198 Comments at 20; Viacom 07-198 Comments at 6-8; NBC 07-198 Comments at 42-45.

¹¹²⁶ See Fox 07-198 Comments at 21-22; Time Warner Inc. Reply, MB Docket No. 07-198 (filed Feb. 12, 2008) at 2-5.

purchase any particular network or combination of networks. Viacom further contends that it does not deny small and rural cable operators access to package deals and volume discounts. The company indicates it has adopted a flexible approach in negotiating carriage with small cable operators, including on occasion making certain programming services available to distributors with no license fee or for a nominal amount as well as paying small cable operators for carriage in certain situations.¹¹²⁷

352. Disney also disputes the complaints surrounding ESPN3, which it believes relate to private business negotiations. It asserts nonetheless that ESPN does not force distributors of any size to carry any of its products. Disney indicates that ESPN works collaboratively with ISPs distributing ESPN3 to acquire new high-speed data subscribers as well as retain and upgrade existing high-speed data and video customers.¹¹²⁸

353. Small and rural carriers also argue that they pay disproportionately higher prices for retransmission consent.¹¹²⁹ ACA states that small and medium-sized MVPDs pay double the retransmission consent fees of large providers.¹¹³⁰ ACA submits data indicating that broadcasters receive retransmission consent fees ranging from \$0.14 to \$0.75 per subscriber per month, with smaller and medium-sized cable operators paying the highest fees.¹¹³¹ ACA contends that higher retransmission fees increase consumer costs, which negatively affects entry into the MVPD market and reduces improvements to service and networks.¹¹³²

354. ACA's members also report facing "take-it-or-leave-it" retransmission consent offers that may lead them to temporarily or permanently drop broadcast television stations.¹¹³³ For example, in the 2008 retransmission consent negotiations, 20 percent of respondents to ACA's 2009 survey were forced to temporarily drop a broadcast television station since the parties failed to reach a new retransmission consent agreement prior to the expiration of the previous agreement.¹¹³⁴ Similarly, nearly half of the respondents in NTCA's 2010 survey indicated that broadcasters issued "take it or leave it" ultimatums.¹¹³⁵ Sixty percent of NTCA's survey respondents opted to take the offer for fear of losing customers; 22

¹¹²⁷ See Viacom 07-198 Comments at 11-13.

¹¹²⁸ See Disney 8/28/09 Reply at 6-7.

¹¹²⁹ As indicated previously, the Commission has initiated a proceeding to examine certain concerns related to retransmission consent. See *Retransmission Consent NPRM*, *supra*, n. 154.

¹¹³⁰ See ACA 6/8/11 Comments at 6. According to ACA, generally rural providers also must pay transport fees because they operate outside the local broadcaster's signal contours – a cost that is typically passed on to rural consumers. ACA states these fees are as high as \$0.50 per subscriber per signal per month, but are sometimes more. See *id.* at 14-15. In addition, in a 2009 survey of ACA's membership, respondents indicated that retransmission consent fees were rising faster than the cost of other types of programming. According to respondents, retransmission consent fees were about 8 percent of the total video programming expenses in 2009 compared to 2.4 percent in 2008. See ACA 5/20/09 Comments at 6-7.

¹¹³¹ See ACA 6/8/11 Comments at 8. ACA also contends that retransmission consent fees are even higher when two or more broadcasters in the same DMA engage in coordinated retransmission consent negotiations. See *id.* at 10-14.

¹¹³² See ACA 6/8/11 Comments at 8-9; ACA 5/20/09 Comments at 15-16 (indicating that in a 2009 survey of its membership, 88 percent of respondents had or were planning to increase cable rates on their basic service packages). See also SureWest 7/8/11 Reply at 5 (arguing that higher retransmission consent costs for smaller MVPDs limit their ability to effectively compete with the incumbent cable operator, and thus negatively impacts consumer choice).

¹¹³³ See ACA 5/20/09 Comments at 13-15.

¹¹³⁴ See *id.* at 14.

¹¹³⁵ See Rural Associations 6/8/11 Comments at 10.

percent of respondents who declined the offer ultimately were barred from receiving access to the broadcast stations.¹¹³⁶ ACA further explains non-cash/in-kind compensation provides broadcasters with another means to obtain compensation from small MVPDs for programming. These types of concessions may include requiring cable operators to carry multicast feeds, to purchase advertising time from the broadcaster, or to participate in joint marketing campaigns with the broadcaster.¹¹³⁷

355. As previously indicated, broadcasters have asked the Commission to reject requests to significantly alter its retransmission consent rules.¹¹³⁸ With respect to smaller MVPDs, NAB argues that there is no evidence or data to support the assertion that smaller MVPDs receive less favorable retransmission fees, terms, and conditions in comparison to larger MVPDs.¹¹³⁹ NAB also indicates that retransmission consent fees, terms, and conditions are based on economies of scale, which is a trademark of a competitive marketplace.¹¹⁴⁰ NAB therefore contends that even if price differentials exist in the retransmission consent fees between smaller and larger MVPDs, there is no evidence of price discrimination.¹¹⁴¹

B. Broadcast Stations

356. Television markets serving rural populations tend to have fewer local full-power stations. Consumers may also rely more on multicasting than those in large markets for the delivery of major network signals such as ABC, CBS, FOX, and NBC. As of July 2011, 49 of the 210 television markets had three or fewer full-power commercial broadcast stations assigned to them. All of these markets are ranked below 100.¹¹⁴² Combined, all 49 markets with three or fewer stations represent about 4.6 million television households, or four percent of the estimated 115.9 television households nationwide as of the 2010-2011 television season.¹¹⁴³ Of the 49 markets, 28 receive at least one of the four major networks via a digital multicast signal.¹¹⁴⁴ Yet Nielsen estimates for 2011 that the percentage of households relying on over-the-air distribution of broadcast stations is about the same in the three different categories of counties – 9 percent in A Counties, 11 percent in B Counties, and 10 percent in C and D Counties.¹¹⁴⁵

C. OVDs

357. As discussed earlier, consumers need high-speed Internet access in order to have access to OVDs' video content. Unfortunately, many consumers in rural America still lack access to this

¹¹³⁶ See *id.* See also SureWest 7/8/11 Reply at 7-8 (encouraging the Commission to allow MVPDs to substitute network and syndicated broadcast programming from a station in a neighboring market in order to minimize the competitive harm from broadcasters' withholding retransmission consent).

¹¹³⁷ See ACA 5/20/09 Comments at 7-10. ACA indicates requiring the carriage of multicast feeds is a particularly difficult business arrangement for smaller operators with limited bandwidth capacity. See *id.* at 8 & 10.

¹¹³⁸ See *supra*, ¶ 60.

¹¹³⁹ NAB 7/8/11 Reply, Attachment A at 49.

¹¹⁴⁰ *Id.* at 50.

¹¹⁴¹ *Id.* at 51.

¹¹⁴² FCC staff estimates based on data from BIA. DMA ranks and number of stations within each DMA are not directly correlated. See *supra*, ¶ 162.

¹¹⁴³ FCC staff estimates based on data from Nielsen. *Local Television Market Universe Estimates*, used throughout the 2010-2011 season.

¹¹⁴⁴ FCC staff estimates based on data from BIA, July 2011.

¹¹⁴⁵ See Nielsen 2010 & 2011 Television Audience Report at 6. See also *supra*, n. 1113.

important resource. The Commission's 2011 Rural Broadband Report found that 72.5 percent of the 26.2 million Americans that still lack access to 3 Mbps/768 kbps or faster of fixed broadband service live in rural areas, even though only 21.7 percent of all Americans reside in rural areas.¹¹⁴⁶ The report also found that close to three out of ten rural Americans – 28.2 percent – are without access to fixed broadband at 3 Mbps/768 kbps or faster, which is nine times larger than the three percent of Americans without access in non-rural areas.¹¹⁴⁷ Additional data further indicates that rural consumers have fewer options with respect to broadband technologies and providers than other consumers.¹¹⁴⁸

358. As discussed earlier, despite these findings, NTCA finds that a significant majority of rural telcos provide broadband service to at least some portion of their service territory and that several rural telcos include a broadband connection in their service bundles.¹¹⁴⁹ NTCA's members also report operating in an increasing competitive market for broadband service.¹¹⁵⁰ Eighty-one percent of OPASTCO's 2009 survey respondents suggested that the increase of online video has heightened demand for faster broadband speeds – with 91 percent of respondents providing, or planning to offer, tiered broadband services.¹¹⁵¹

V. KEY INDUSTRY INPUTS

359. In this section of the Report, we consider key inputs that may affect competition in the market for the delivery of video programming. Specifically, we discuss below creators and aggregators of video programming and consumer premises equipment.

A. Content Creation and Aggregation of Video Programming

1. Overview

360. Television programs and movies are often created and licensed by major studios that are subsidiaries of entertainment conglomerates that also own broadcast and cable networks. Collectively, the broadcast and cable networks of seven companies – Disney, News Corp., NBC Universal, Time Warner Inc., CBS, Viacom, and Discovery – account for about 95 percent of all television viewing hours in the United States.¹¹⁵² Of those, only Discovery, which produces its own programming, does not own a

¹¹⁴⁶ See FCC, BRINGING BROADBAND TO RURAL AMERICA: UPDATE TO REPORT ON RURAL BROADBAND STRATEGY (2011), attached to *Chairman Genachowski Releases Update to 2009 Broadband Report*, GN Docket No. 11-16, Public Notice, 26 FCC Rcd 8680, 8688, ¶ 10 (2011) (noting that the analysis is based upon the State Broadband Initiative Data (formerly known as SBID Data)).

¹¹⁴⁷ See *id.*

¹¹⁴⁸ See *id.*

¹¹⁴⁹ See NTCA 5/20/09 Comments at 2-3.

¹¹⁵⁰ See *id.* at 3. In the 2008 Broadband Survey, 93 percent of NTCA's survey respondents reported facing competition from at least one service provider for at least some of their customers. The typical respondent competed with two national ISPs, two satellite broadband providers, two wireless ISPs, and one cable company. In particular, 55 percent of respondents facing competition reported that their competitors were only serving cities and towns in the respondent's service area; 45 percent of respondents said their competitors were serving customers throughout the respondent's service area. See *id.*

¹¹⁵¹ See OPASTCO 7/29/09 Comments at 5. Tiered broadband service refers to the practice of offering a selection of broadband speeds at different price points. See *id.*

¹¹⁵² Craig Moffett *et al.*, *Weekend Media Blast: Why We Haven't Seen a Virtual MSO Yet*, Bernstein Research, Jan. 27, 2012, at 2.

major television or movie studio.¹¹⁵³ These conglomerates may also produce programs for each other's networks.¹¹⁵⁴ In addition, there are independent studios, such as The Weinstein Company, that create television programming and movies.¹¹⁵⁵ Movie and television studios generally produce and distribute their own programs and movies, and retain ultimate distribution rights.¹¹⁵⁶ In some cases, however, studios distribute programs and movies on behalf of third parties.¹¹⁵⁷ Industry participants claim that the production and distribution of television programming and films are inherently risky businesses.¹¹⁵⁸ While studios invest a substantial amount up front to produce video content, the revenues derived from the production, distribution and licensing of such content depend primarily on a program's acceptance by the public, which is difficult to predict.¹¹⁵⁹

361. GAO estimates for the Fall 2009 broadcast prime time schedule, the top five program producers were the studios affiliated with ABC, CBS, FOX, NBC, and The CW (WBTVG).¹¹⁶⁰ For the individual networks, the 2010 share of in-house productions was: ABC, 60 percent; CBS, 61 percent; The CW, 90 percent; FOX, 72 percent; and NBC, 63 percent.¹¹⁶¹ Industry observers and participants

¹¹⁵³ On the other hand, Sony Corporation operates a television and movie studio, but does not operate cable or broadcast networks.

¹¹⁵⁴ For example, News Corp.'s Twentieth Century Fox Television produces *Modern Family* for Disney's ABC, *Awake* for Comcast's NBC, *How I Met Your Mother* for CBS, and *Futurama* for Viacom's Comedy Central. News Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 9-10 ("News 2010 Form 10-K").

¹¹⁵⁵ The Weinstein Co., *About The Weinstein Company*, <http://weinsteincow.com/about-us/> (visited Mar. 7, 2012).

¹¹⁵⁶ For example, Warner Brothers Television Group ("WBTVG"), a subsidiary of Time Warner, develops and produces new television series (e.g., *Two and a Half Men*), reality-based entertainment shows and animation programs for Time Warner's cable networks and third parties. Time Warner Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 7 ("Time Warner 2010 Form 10-K"). In 2010, Warner Brothers Studios, another subsidiary of Time Warner, wholly financed the production, marketing, advertising and distribution of eight films, while distributing 15 films financed in whole or in part by other parties. *Id.*

¹¹⁵⁷ For example, Viacom's Paramount Studios distributes animated feature films produced by DreamWorks Studios and CBS Films. Michael Cieply & Brooks Barnes, *A Studio's Real-Life Drama*, N.Y. TIMES, Jan. 29, 2012, <http://www.nytimes.com/2012/01/30/business/media/dreamworks-caught-in-a-real-life-drama.html?pagewanted=all> (visited Feb. 10, 2012); Viacom Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 66 ("Viacom 2010 Form 10-K"). In addition, Lionsgate has home video distribution rights to prime time series and library titles from ABC Studios, while CBS Television Distribution syndicates Harpo Studio's *Dr. Phil* and *Rachael Ray* to television stations. See Lions Gate Entertainment Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 18 ("Lionsgate 2010 Form 10-K"); Harpo, Inc., *Oprah Winfrey's Official Biography*, <http://www.oprah.com/pressroom/Oprah-Winfreys-Official-Biography/7> (visited Mar. 26, 2012); CBS Studios Inc., *CBS Television Distribution - Featured Shows*, http://www.cbstv.com/shows_main.aspx (visited Mar. 26, 2012).

¹¹⁵⁸ Time Warner 2010 Form 10-K at 19.

¹¹⁵⁹ *Id.* According to Time Warner, the public acceptance of the studios' content depends on many factors, including the availability of competing content, the availability of alternative forms of leisure and entertainment time activities, the adequacy of efforts to limit piracy, studios' ability to develop strong brand awareness and target key audience demographics, studios' ability to anticipate and adapt to changes in consumer tastes and behavior on a timely basis, and general economic conditions.

¹¹⁶⁰ GAO, *Media Programming: Factors Influencing the Ability of Independent Programming in Television and Programming Decisions in Radio*, GAO-10-369, Mar. 2010, at 13. The CW network is jointly owned by CBS and Time Warner.

¹¹⁶¹ WGAW 6/8/11 Comments at 6. See also Deana Myers, *Comedy Returns to Broadcast*, SNI, Kagan, May 27, 2011. To promote a more competitive media marketplace, the Writers Guild of America, West proposes that the (continued....)

believe that in order to retain control over the distribution of their content, including OVD and VOD distribution, networks may rely more on in-house production.¹¹⁶² Time Warner asserts that despite the increasing number of networks distributed by MVPDs, access to prime time and syndicated television slots for its studio has tightened as networks and O&Os increasingly rely on programming from content producers aligned with or owned by their parent companies.¹¹⁶³ Time Warner, which owns studios that are not vertically integrated with a broadcast television network, states that this could lead it and similarly situated studios to launch fewer new television series and to receive lower licensing fees.¹¹⁶⁴

362. *Broadcast Programming.* Broadcast networks license programming from in-house production studios, third-party studios, and sports leagues.¹¹⁶⁵ Television production studios develop programs in collaboration with independent writers, producers, and creative teams.¹¹⁶⁶ Broadcast networks' primary expense is the cost to acquire or license television programming, including sports programming and feature films.¹¹⁶⁷ Premium sports programming is the most expensive, while reality and non-fiction programming are the least expensive.¹¹⁶⁸ Broadcast networks also incur the expense of producing certain programming, most notably non-entertainment programming, such as news and public affairs, that is unlikely to be acquired from a studio. SNL Kagan estimates that programming costs for 11

(Continued from previous page)

Commission require the broadcast networks devote at least 25 percent of their prime time schedule to programming that is owned and produced by independent sources. WGAW 6/8/11 Comments at 15-16. WGAW defines independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or an MVPD provider. *Id.* at 3.

¹¹⁶² Spencer Wang, Shub Mukherjee, and Michael Senno, *Entertainment Industry: Not All Cable Networks Are Created Equal*, Credit Suisse, Jan. 31, 2012, at 34 ("Wang") ("[W]e believe that cable networks that own more of their programming will have more control over their destiny. . . . [E]ven if the total [number of MVPD subscribers] declines, networks that own the programming that they air will be able to [earn revenue from] their content by selling these rights to [OVDs]."). See also Time Warner 2010 Form 10-K at 25; Sony Kabushiki Kaisha (Sony Corporation), *SEC Form 20-F for the Fiscal Year Ended March 31, 2011*, at 31 ("[B]roadcast networks in the U.S. continue to produce their own shows internally.").

¹¹⁶³ Time Warner 2010 Form 10-K at 10-11. Studios differ on how they assess cable and broadcast networks' demand for television programming. Lionsgate expects to see an increase in demand for its programming. It expects key drivers to include the success of the cable industry's bundled services, increased average revenue per user and accelerated growth in advertising. Additionally, Lionsgate claims increased capacity for channels on upgraded digital cable systems and satellite systems has led to the launch of new networks seeking programming to compete with traditional broadcast networks as well as other existing networks. Lionsgate 2010 Form 10-K at 7.

¹¹⁶⁴ Time Warner 2010 Form 10-K at 25.

¹¹⁶⁵ The Walt Disney Co., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 ("Disney 2010 Form 10-K"); News 2010 Form 10-K at 13, 46, 55-56; Comcast Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 10 ("Comcast 2010 Form 10-K"); CBS Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1-2 ("CBS 2010 Form 10-K").

¹¹⁶⁶ Individual studios develop half-hour comedies, one-hour dramas, television movies, mini-series, and/or non-fiction programming for cable or broadcast networks. Disney 2010 Form 10-K at 1; Lionsgate 2010 Form 10-K at 48; Time Warner 2010 Form 10-K at 7-8.

¹¹⁶⁷ Broadcast networks, including CBS, FOX, and ABC, whose television studios operate as separate divisions of their conglomerates, include in-house programming as expenses. News 2010 Form 10-K at 9; Disney 2010 Form 10-K at 30; CBS 2010 Form 10-K at 1-2. In contrast, NBC Universal's NBC and Telemundo broadcast networks and production studios operate as a single division, competing directly with other productions studios and content creators. Comcast 2010 Form 10-K at 9-10.

¹¹⁶⁸ Wang at 31.

nationally distributed English and Spanish-language broadcast networks stayed relatively steady from \$13.1 billion in 2006 to \$13.4 billion in 2010.¹¹⁶⁹

363. For a typical broadcast entertainment program, about one year ahead of the scheduled air date, each broadcast television network selects approximately two or three dozen shows to develop into a pilot or sample episode. Of the approximately 120 pilots that studios produce for the major broadcast networks, about half are selected for the start of the coming television season. The networks usually commit to funding 13 episodes of a weekly series provided that the show attracts a minimum number of viewers, with an option to order an additional nine to 11 episodes to complete the television season.¹¹⁷⁰ As of 2010, an hour-long, scripted pilot could cost a studio between \$2.7 million and \$3 million to produce, with some costing significantly more.¹¹⁷¹ Broadcast networks may pay a studio about \$1.5 million to license the program.¹¹⁷²

364. Broadcast networks derive about 99 percent of their net operating revenues¹¹⁷³ from the sales of advertising time for their network broadcasts.¹¹⁷⁴ The ability to sell commercial time and the rates received are primarily dependent on the size and nature of the audience that the network can deliver to the advertiser as well as overall advertiser demand for time on network broadcasts.¹¹⁷⁵ A decrease in audience ratings can lead to a reduction in pricing and advertising spending, adversely affecting a

¹¹⁶⁹ SNL Kagan, *TV Network Industry Benchmarks: Broadcast (2006 – 2010)* (“SNL Kagan Broadcast Benchmarks”). SNL Kagan defines programming expenses as the direct cost of creating, acquiring, and distributing content and services. For the years 2006-2010, SNL Kagan included financial data from CBS, NBC, ABC, FOX, Univision, The CW, Telemundo, TeleFutura, ION, Azteca America, and MyNetwork TV. For 2006, SNL Kagan includes figures from the networks The WB and UPN in the industry totals. For 2009 and 2010, SNL Kagan also includes figures from Estrella TV in broadcast network industry estimates. See also SNL Kagan, *Media Trends*, 2011 Edition, at 20-21 (“SNL Kagan 2011 Media Trends”). NBC has higher costs in even years due to the Olympics. *Id.*

¹¹⁷⁰ Each year, studios can lose hundreds of millions of dollars on flops. See, e.g., Meg James, *TV’s Evolution Brings New Profit Squabbles*, L.A. TIMES, Jan. 17, 2006, at C1. In contrast, Discovery Networks CEO David Zaslav stated that they have made a concerted effort to “trim the waste” of the development process by waiting to see how a pilot episode performs before ordering more than four episodes at time. Discovery Communications, Inc., *Presentation to Deutsche Bank Media & Telecom Conference*, Corrected Transcript, Feb. 28, 2012, at 5 (“Discovery Presentation Transcript”). Netflix, on the other hand, has ordered 26 episodes of an original series, *House of Cards*, for about \$4 million per episode, without a pilot episode. Ben Fritz & Joe Flint, *Netflix Less about Flicks, More about TV*, L.A. TIMES, Feb. 4, 2012, at B1.

¹¹⁷¹ See Marisa Guthrie, *Is Network TV’s Model Lost?*, BROADCASTING & CABLE, Apr. 26, 2010, at 10. A half-hour situation comedy costs slightly less, about \$2-\$3 million per episode in 2011. Paige Albinak, *Will Sheen Get Payne Treatment on New Show?*, BROADCASTING & CABLE, July 25, 2011, at 29. Network reality programs are less expensive to produce, with the average cost between \$1.5 million and \$2 million per episode. Bill Carter, *NBC to Pay Outsiders for Blocks of Programs*, N.Y. TIMES, Dec. 3, 2007, at C1.

¹¹⁷² See Bill Carter, *NBC to Pay Outsiders for Blocks of Programs*, N.Y. TIMES, Dec. 3, 2007, at C1.

¹¹⁷³ Net advertising revenue is the total amount networks charge advertisers to carry their commercials net of commissions charged to client companies by ad agencies to buy time on the networks, i.e., the revenues that broadcast networks actually receive. Net operating revenue includes net advertising revenue plus all other sources of revenues. See Table 25.

¹¹⁷⁴ CBS 2010 Form 10-K at 1-2; Disney 2010 Form 10-K at 1; News 2010 Form 10-K at 45.

¹¹⁷⁵ Disney 2010 Form 10-K at 1.

broadcast network's financial performance.¹¹⁷⁶ Between 2006 and 2008, net operating revenues for the broadcast television network industry increased from \$16.6 billion to \$16.8 billion. In 2009, it declined to \$15.5 billion, but increased to \$16.4 billion in 2010.¹¹⁷⁷

Table 25: Broadcast Television Network Industry Financial Performance¹¹⁷⁸

Revenue (in thousands)					
	2006	2007	2008	2009	2010
Gross Advertising	\$19,422,445	\$19,504,124	\$19,680,532	\$18,134,566	\$19,173,013
Net Advertising	\$16,509,078	\$16,578,505	\$16,728,452	\$15,414,381	\$16,297,061
Other Operating Revenue	\$51,278	\$59,994	\$48,964	\$61,120	\$87,006
Net Operating Revenue	\$16,560,356	\$16,638,499	\$16,777,416	\$15,475,501	\$16,384,067
Expenses (in thousands)					
	2006	2007	2008	2009	2010
Operating SG &A	\$2,412,129	\$2,326,703	\$2,319,787	\$2,301,060	\$2,350,880
Programming	\$13,054,780	\$12,728,519	\$13,337,526	\$12,613,117	\$13,414,689
Network Compensation	\$246,632	\$170,650	\$133,563	\$81,467	\$48,109
Total Operating Expenses	\$15,713,541	\$15,225,872	\$15,790,876	\$14,995,644	\$15,813,678
Cash Flow (in thousands)					
	2006	2007	2008	2009	2010
Cash Flow	\$846,814	\$1,412,628	\$986,540	\$479,857	\$570,389
Cash Flow Margin (%)	5.11%	8.49%	5.88%	3.10%	3.48%

365. Studios often do not profit from a show for several years, if ever. They hope to earn large revenues during subsequent distribution windows of the programs¹¹⁷⁹ in ancillary markets, including syndication to broadcast television stations and/or cable networks; DVD and Blu-ray release; international distribution; and online distribution. The performance of a television series in subsequent distribution

¹¹⁷⁶ News 2010 Form 10-K at 30-31. ABC was nevertheless able to increase its advertising rates between 2009 and 2010 for prime time programming despite a decline in prime time ratings. Disney 2010 Form 10-K at 29-30.

¹¹⁷⁷ SNL Kagan Broadcast Benchmarks. Increased revenues for broadcast networks in even years are due in part to the airing of the Olympics. Because most political advertising is purchased on a regional basis (e.g., on a statewide basis for gubernatorial and senate elections as well as presidential campaigns that target swing states), it tends to impact broadcast stations more than broadcast networks. In some cases, however, presidential campaigns may purchase advertising on broadcast networks. See Jim Rutenberg, *Nearing Record, Obama's Ad Effort Swamps McCain*, N.Y. TIMES, Oct. 18, 2008, at A1.

¹¹⁷⁸ FCC staff estimates based on data from SNL Kagan. See SNL Kagan Broadcast Benchmarks.

¹¹⁷⁹ CBS 2010 Form 10-K at 1-3; Lionsgate 2010 Form 10-K at 8.

windows is highly correlated with the ratings of its initial telecast.¹¹⁸⁰ Typically, a series must be broadcast for at least three to four television seasons to generate a sufficient number of episodes to make it desirable for syndication to broadcast television.¹¹⁸¹ Moreover, not all series lend themselves to subsequent distribution. For example, with respect to the syndication market, broadcast stations and cable networks prefer series with episodes that have self-contained storylines which give them the flexibility to schedule the episodes out of sequence.¹¹⁸² The most popular network television series are sold into both broadcast television station and cable network syndication.¹¹⁸³ In the past, studios primarily sold television situation comedies to broadcast television stations. As cable networks have earned more in fees from MVPDs, their programming budgets have increased, enabling them to bid for situation comedies as well as dramas.¹¹⁸⁴ Unscripted, or “reality” programming, generally has little value in the syndication after its initial airing.¹¹⁸⁵

Table 26: Television Studio Revenue Streams¹¹⁸⁶
(Revenue in millions)

	2006	2007	2008	2009	2010
Broadcast Network	\$12,434	\$12,197	\$12,786	\$12,048	\$12,693
Syndication (Cash)	\$3,162	\$3,303	\$3,379	\$3,316	\$3,227
Syndication (Gross Barter)	\$2,902	\$2,823	\$3,015	\$2,878	\$2,813
Basic Cable Networks: RSNs (Cash)	\$15,197	\$17,165	\$18,783	\$20,855	\$22,460
Premium Cable TV Domestic	\$2,584	\$2,594	\$2,611	\$2,696	\$2,989
Total Domestic	\$36,280	\$38,082	\$40,573	\$41,793	\$44,182
Total International	\$8,666	\$8,965	\$9,454	\$10,178	\$10,555
Total TV Programming	\$44,946	\$47,047	\$50,027	\$51,970	\$54,737

¹¹⁸⁰ A network’s decision to cancel a program due to poor ratings may prevent a studio from recouping its production expenses, requiring the studio to immediately write-off of any unamortized production costs. Viacom 2010 Form 10-K at 65.

¹¹⁸¹ More recently, syndication sales have occurred within the first two seasons of a show’s initial airing. One-hour dramatic series airing on broadcast networks between 2000 and 2010 only had a 17.1 percent probability of being renewed into a fourth season. Deana Myers, *1-Hours: Chance of Success*, SNL Kagan, Dec. 22, 2011.

¹¹⁸² *Second Life: Digital \$\$\$ Amp Syndie Biz*, DAILY VARIETY, July 21, 2011, at 1.

¹¹⁸³ Deann Myers, “Off-Network Deals Continue to Break Records,” *Economics of Networks*, SNL Kagan, JULY 9, 2012.

¹¹⁸⁴ SNL Kagan, *Syndication: Background*, Economics of TV Programming and Syndication (2007) at 70.

¹¹⁸⁵ For this reason, rights holders for reality programming often allow entire seasons to be available online instead. Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rules*, DAILY VARIETY, Nov. 14, 2011, <http://www.varietv.com/article/VR1118046062> (visited Mar. 26, 2012).

¹¹⁸⁶ FCC staff estimates based on data from SNL Kagan. See SNL Kagan 2011 Media Trends at 196 (containing the data for 2009-2011); SNL Kagan, Data Library, *Worldwide TV Programming Market for U.S. Producers Programming (\$ Mil.)*, Historical, Nov. 30, 2009 (containing the data for 2006-2008).

366. *Cable Programming.* Similar to broadcast networks, cable networks also license programming from in-house production studios, third-party studios, and sports leagues. As with broadcast networks, programming represents a major expense for cable networks.¹¹⁸⁷ SNL Kagan estimates that combined, the basic cable networks' programming expenses were \$14.4 billion in 2006, representing 44.1 percent of total \$32.6 billion in net industry revenues for cable networks, and rose to \$20 billion in 2010, representing 44.2 percent of \$45.3 billion in net industry revenues for cable networks.¹¹⁸⁸ A typical hour-long, scripted cable drama costs less to produce than a broadcast drama, approximately \$2 million per episode. And cable networks generally pay lower licensing fees than broadcast networks – about \$1 million per episode.¹¹⁸⁹ On the other hand, the returns for a studio on a popular cable network show may be less than a broadcast network show because the former tends to attract a fraction of audience in its original airing.¹¹⁹⁰ In addition, cable series have about 10 to 13 episodes per series per season compared with 22 to 24 episodes for a broadcast series.¹¹⁹¹

367. Cable networks are the primary source of profit for entertainment conglomerates.¹¹⁹² Cable networks earn revenues primarily from two sources, advertising and MVPD license fees paid on a per subscriber basis. Premium cable networks, described in more detail below, are generally available to subscribers for an additional fee, are commercial-free, and offer specialized programs including unedited movies, original series, and sporting events. Combined, basic cable networks earned about \$15.1 billion in net advertising revenues in 2006, and \$19 billion in net advertising revenues in 2010.¹¹⁹³ Subscriber fees rose at a much faster rate. Basic cable networks collectively earned about \$16.3 billion in subscriber fees in 2006, and \$24.9 billion in 2010.¹¹⁹⁴ A two-tier structure has emerged in which the established

¹¹⁸⁷ Wang at 29, 32.

¹¹⁸⁸ SNL Kagan, *TV Network Industry Benchmarks: Basic Cable Networks (2006 – 2010)* ("SNL Kagan Basic Cable Benchmarks"). For broadcast and cable networks, sales, general, and administrative expenses ("SGA") represent the other major expense besides programming. We compare the profit margins of the two types of networks in our discussion of sports programming, *infra.* ¶¶ 371-76. See also Wang at 27-33 (indicating that programming expenses play a key role in a cable network group's cost structure).

¹¹⁸⁹ Because they know that they will earn less money from cable networks, studios adjust their budgets accordingly. They rely on tighter budgets, smaller deficits, and investment by international markets. Bill Carter, *Weighty Dramas Flourish on Cable*, N.Y. TIMES, Apr. 4, 2010, at B1; SNL Kagan TV Programming Report 109.

¹¹⁹⁰ In addition, the possibilities for syndication are more limited, since cable networks fear that they might dilute their brand by running programming that originally aired on a competitor. SNL Kagan TV Programming Report at 109.

¹¹⁹¹ Bill Carter, *Embracing Cable's Concept of Opening Night*, N.Y. TIMES, Jan. 15, 2012, at B3. Cable networks generally air episodes of a series consecutively, with no pre-emptions or repeats, while broadcast networks spread the episodes out over a period of nine months. *Id.*

¹¹⁹² For five of the entertainment conglomerates (Disney, Time Warner, Viacom, Discovery Networks, and News Corp.), cable networks contribute anywhere from 60 percent to more than 90 percent of companywide earnings before interest and taxes ("EBIT"). Wang at 2. See also Comcast Corp., *Comcast and GE Announce Content Joint Venture* (slide presentation), Dec. 3, 2009, at 4 ("Cable channels represent 82% of the new joint venture's OCF [Operating Cash Flow] and drive its profitability."), <http://www.cmcsk.com/events.cfm?Year=2009> (visited Mar. 2, 2012); Meg James, *Cost of Cable TV Content Soars*, L.A. TIMES, Dec. 8, 2011, at B1.

¹¹⁹³ SNL Kagan, *Economics of Basic Cable Networks*, 2011 Edition, at 13 ("SNL Kagan Basic Cable Report"). See also Table 27; SNL Kagan Basic Cable Benchmarks.

¹¹⁹⁴ SNL Kagan Basic Cable Report at 13. See also SNL Kagan Basic Cable Benchmarks. Basic cable networks collectively earned about \$1.3 billion in additional operating revenue in 2006 and about \$1.4 billion in 2010. Depending on the structure of the cable networks' parent company, this revenue may include ancillary revenues (continued....)

major-brand cable networks charge MVPDs subscriber fees, while newer networks pay MVPDs for carriage in order to launch.¹¹⁹⁵ The top networks enjoy relatively high per subscriber license fees, while less viewed cable networks, even those that are well established, might receive only a few pennies per month per subscriber. For example, in 2010 ESPN charged on average \$4.39 per month per subscriber (up from \$3.48 in 2007). On the other hand, TNT, the most expensive non-sports network, charged \$1.06 in 2010 (up from \$0.91 in 2007) and MTV Hits charged \$0.01 in 2010 (the same price charged in 2007).¹¹⁹⁶ Collectively, Comcast, Discovery, News Corp., Disney, Viacom, and Time Warner earned more than 69 percent of total basic cable subscriber fees in 2010, and 84 percent of basic cable network advertising revenues.¹¹⁹⁷ For several MVPDs, subscriber fees paid for carriage of programming is a major expense, or their single largest expense item.¹¹⁹⁸

Table 27: Basic Cable Network Financial Performance¹¹⁹⁹

Revenue (in thousands)	2006	2007	2008	2009	2010
Gross Advertising	\$17,762,171	\$19,268,379	\$20,639,236	\$20,459,863	\$22,509,530
Net Advertising	\$15,097,845	\$16,370,881	\$17,538,855	\$17,388,205	\$19,113,100
Subscriber Fees	\$16,225,993	\$18,340,322	\$20,507,329	\$22,732,037	\$24,756,531
Other Operating Revenue	\$1,295,956	\$1,541,676	\$1,445,783	\$1,267,576	\$1,376,143

Net Operating Revenue	\$32,619,795	\$36,252,879	\$39,491,967	\$41,387,819	\$45,265,744
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Expenses (in thousands)

	2006	2007	2008	2009	2010
Operating SG&A	\$6,614,666	\$6,839,323	\$6,930,042	\$6,572,993	\$6,765,499
Programming	\$14,358,296	\$16,156,814	\$17,462,761	\$18,567,669	\$20,045,769

Total Expenses	\$20,972,961	\$22,996,137	\$24,392,803	\$25,140,823	\$26,814,919
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Cash Flow (in thousands)

	2006	2007	2008	2009	2010
Cash Flow	\$11,646,934	\$13,257,188	\$15,099,056	\$16,247,693	\$18,450,826
Cash Flow Margin (%)	35.7%	36.6%	38.2%	39.3%	41.0%

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from consumer product licensing, brand licensing, home entertainment sales of programming, and syndication or international distribution. See Viacom 2010 Form 10-K at 37-38; CBS 2010 Form 10-K at 11-7; Time Warner 2010 Form 10-K at 2.

¹¹⁹⁵ See Vogel *supra*, n. 463, at 351, n. 17.

¹¹⁹⁶ SNL Kagan, *TV Network Summary: Basic Cable Network by Affiliate Revenue Per Avg Sub Month (2006 – 2010)* (“SNL Kagan Basic Cable Network Affiliate Revenue”). Other networks (e.g., FamilyNet and ReelChannel) do not charge any monthly subscriber fees. *Id.*

¹¹⁹⁷ Wang at 8.

¹¹⁹⁸ See, e.g., Comcast 2010 Form 10-K at 4; Time Warner Cable 2010 Form 10-K at 23; Cablevision 2010 Form 10-K at 32; Suddenlink 2010 *Annual Report* at 25-26; Mediacom 2010 Form 10-K at 11; DISH Network 2010 Form 10-K at 19. MVPDs expect these costs to rise. See, e.g., Comcast 2010 Form 10-K at 41; Time Warner Cable 2010 Form 10-K at 38; Cablevision 2010 Form 10-K at 32; Charter 2010 Form 10-K at 8; Insight 2010 Form 10-K at 36; Suddenlink 2010 *Annual Report* at 12-13; DIRECTV 2010 Form 10-K at 19; DISH Network 2010 Form 10-K at 19.

¹¹⁹⁹ FCC staff estimates based on data from SNL Kagan. See SNL Kagan Basic Cable Benchmarks.

368. *Movies.* Similar to television production, movie production, marketing and distribution can involve significant costs over an extended period of time.¹²⁰⁰ The production process involves decisions regarding financing a movie, development of a screenplay, assembling the artistic and technical staff, and the actual filming and post-filming editing/post-production process.¹²⁰¹ Studios may distribute their own movie productions or they may acquire movies for theatrical release and/or other distribution outlets from the content's creator.¹²⁰² Feature films typically are produced or acquired for initial exhibition in theaters, followed by ancillary distribution windows.

369. A studio typically incurs losses during a movie's theatrical exhibition, and may not realize profits until well after that time. Studios indicate that the costs of producing and marketing movies have steadily increased in recent years, outpacing domestic theater revenues.¹²⁰³ In particular, Viacom states that the costs of movie production have risen faster than revenues from ancillary markets.¹²⁰⁴ On average, six or seven out of ten major theatrical movies produced may be unprofitable, and one might break even.¹²⁰⁵ Premium cable networks provide a sizable source of production financing for the movie studios, representing nearly 12 percent of their revenues in 2010. These networks commit to spending hundreds of millions of dollars in advance to license a specified number of airings of a studio's movie catalog (sometimes exclusively) for up to nine years.¹²⁰⁶ In turn, the premium networks can retain the allegiance of MVPDs, their primary customers. License fees negotiated by the studios are based on the theatrical performance of the movies in the packages. SNL Kagan estimates that in 2010 premium networks spent about 62.5 percent (\$1.87 billion) of their programming budgets on movies, compared with 37.5 percent (\$1.1 billion) on original programming.¹²⁰⁷ In 2007, premium networks spent about 66 percent (\$1.71 billion) of their programming budgets on movies, compared with \$882 million on

¹²⁰⁰ Viacom 2010 Form 10-K at 12-13; Lionsgate 2010 Form 10-K at 24; Time Warner 2010 Form 10-K at 25. The increasing popularity of 3D movies and the trend toward producing event and franchise films (which often entail higher talent costs for movies later in the series) could result in even higher production costs. Time Warner 2010 Form 10-K at 25.

¹²⁰¹ Lionsgate 2010 Form 10-K at 9-10.

¹²⁰² *Id.* at 13-14. According to Lionsgate, the decision to acquire a movie is based on expected critical reaction, marketability, potential for commercial success, cost to acquire the picture, estimated distribution and marketing expenses, and ancillary market potential. *Id.*

¹²⁰³ Viacom estimates that it receives the ultimate revenues for a movie from all distribution windows within ten years of the movie's initial release. It estimates that for acquired film libraries it receives revenues over a period within 20 years from the date of acquisition. Viacom 2010 Form 10-K at 64-65.

¹²⁰⁴ Viacom states that revenues from subsequent markets have historically exhibited a high correlation to domestic theatrical performance. *Id.*

¹²⁰⁵ Vogel at 71.

¹²⁰⁶ *Id.* at 337. For example, the Disney Studio and Sony Studio license television and online viewing rights of their movie catalogs to Starz. Lionsgate, however, generally licenses its films to networks (including TV Guide Network, in which it has an ownership interest), on a film-by-film, rather than an output basis. Lionsgate notes that without multiple output agreements that typically contain guaranteed minimum payments, its revenues may be subject to greater volatility, which could have a material adverse effect on its business, financial condition, operating results, liquidity and prospects. Lionsgate 2010 Form 10-K at 28. In April 2008, Lionsgate, along with Viacom, and MGM studios, formed EPIX, a premium television channel and VOD service, for its theatrical releases after January 1, 2009. EPIX, which launched in October 2009, provides Lionsgate with an additional platform to distribute its library of motion picture titles and television episodes and programs. Lionsgate 2010 Form 10-K at 28; Studio 3 Partners, *What is EPIX?*, <http://corp.epishd.com> (visited Mar. 26, 2012).

¹²⁰⁷ SNL Kagan 2011 Media Trends at 155.

original programming.¹²⁰⁸ On average, about 25 percent of the retail price MVPDs charge consumers for premium networks goes to the movie studios.¹²⁰⁹

Table 28: Motion Picture Studio Revenue Streams¹²¹⁰
(Revenue in millions)

	2006	2007	2008	2009	2010
Domestic:					
Theatrical Rentals	\$4,798	\$5,118	\$5,119	\$5,672	\$5,678
Home Video	\$12,515	\$12,056	\$11,384	\$10,387	\$9,275
PPV/VOD	\$621	\$674	\$804	\$1,013	\$1,443
Premium Cable TV	\$1,731	\$1,713	\$1,689	\$1,820	\$1,868
Digital	\$16	\$70	\$242	\$503	\$752
Basic Cable	\$2,611	\$2,638	\$2,690	\$2,714	\$2,769
Broadcast Networks	\$478	\$444	\$418	\$394	\$372
TV Syndication	\$152	\$158	\$163	\$168	\$173
Other ¹²¹¹	\$1,285	\$1,393	\$1,324	\$1,205	\$1,226
Total Domestic:	\$24,209	\$24,263	\$23,833	\$23,875	\$23,557
Total International:	\$23,881	\$25,379	\$25,853	\$26,184	\$26,453
Total:	\$48,090	\$49,643	\$49,687	\$50,058	\$50,010

370. Home entertainment distribution involves the marketing, promotion and sale and/or lease of DVDs and Blu-ray discs to wholesalers and retailers who then sell or rent them to consumers.¹²¹² Studios also distribute television programs and movies for individual rental through such companies as

¹²⁰⁸ SNL Kagan, *Media Trends*, 2008 Edition, at 201.

¹²⁰⁹ Vogel at 337-38 & 351, n. 16.

¹²¹⁰ Wade Holden, *Distributor Revenue Should Continue Growth*, SNL Kagan, Dec. 28, 2010 (containing the data for 2006-2009); Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept. 26, 2011 (containing the data for 2010).

¹²¹¹ "Other" includes hotel, airline and merchandise licensing.

¹²¹² Lionsgate 2010 Form 10-K at 6. Studios may rely on third parties to manufacture the discs, warehouse the discs, and deliver the discs to retailers. Time Warner 2010 Form 10-K at 8.

Redbox and Rentrak Corporation¹²¹³ or via subscription services such as Netflix¹²¹⁴ and Blockbuster.¹²¹⁵ While the domestic home video window has accounted for the largest proportion of domestic revenues for movie studios for several years, the proportion of movie studios' revenues attributable to this window has declined from 51.6 percent of the total \$24.2 billion in revenues (\$12.5 billion) in 2006 to 39.4 percent of \$23.6 billion in domestic revenues (\$9.3 billion) in 2010.¹²¹⁶

371. *Sports.* As noted above, rights for major sporting events are licensed to networks or stations by professional or collegiate leagues.¹²¹⁷ Some leagues or teams operate their own regional or national cable sports networks (e.g., the NFL Network and Mid-Atlantic Sports network, the latter operated by the Baltimore Orioles and Washington Nationals baseball teams). Many regional sports networks ("RSNs") are affiliated with entertainment conglomerates, such as Disney or Comcast.¹²¹⁸ We estimate that there are 93 RSNs in operation today.¹²¹⁹ The networks or stations may supply their own on-air talent, cameras, and production facilities to create sports programming,¹²²⁰ and sell advertising and sponsorships for the programs. Alternatively, networks can sell airtime to independent production companies for "time buys," in which an outside producer pays production costs and finds advertisers,

¹²¹³ Rentrak Corporation is a global digital media and research company. Its Video Retailer Revenue Sharing service is a wholesale operation that provides regional and independent retailers who rent home entertainment products to customers with an opportunity to acquire new inventory from studios in the same manner as major national chains. Rentrak Corp., *Home Entertainment Services: Video Retailer Revenue Sharing*, http://www.rentrak.com/section/homeent/video_retailers/index.html (visited Mar. 6, 2012).

¹²¹⁴ In addition to playing a role in the home video market for movie studios through its disc rental and streaming services, Netflix is also commissioning original television programs and acquiring distribution rights for library content in the traditional syndication window. See *supra*, ¶ 303.

¹²¹⁵ Lionsgate 2010 Form 10-K at 18. See also Time Warner, Inc., *Presentation to Morgan Stanley Technology, Media & Telecom Conference*, Corrected Transcript, Feb. 29, 2012, at 3 ("Time Warner Presentation Transcript").

¹²¹⁶ Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept. 26, 2011, at 3. See also Time Warner 2010 Form 10-K at 41 (noting that while DVD distribution has been one of the largest drivers of its film studio's revenues and profits over the last several years, the industry and the company have experienced a decline in DVD sales in recent years). Home video consumption falls into three major categories: purchase, rental, and subscription, including subscription video on demand.

¹²¹⁷ Some networks and distributors of content own sports teams (e.g., Comcast owns the Philadelphia Flyers, a National Hockey League team and Liberty Media owns the Atlanta Braves, a National Baseball League team). See Comcast 2010 Form 10-K at 1; Liberty Media Corp., *Atlanta National League Baseball Club*, <http://www.libertymedia.com/assets-braves.aspx> (visited Mar. 8, 2012). The National Football League, however, bars corporate ownership. See John Clayton, *NFL Ownership Growing Increasingly Complicated*, ESPN, July 15, 2008, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=3485962 (visited Mar. 8, 2012).

¹²¹⁸ See *The Regional Sports Network Marketplace*, MB Docket No. 11-128, Report, 27 FCC Red 154, 160-61, ¶¶ 16-17 (MB 2012). Comcast Corporation also owns Comcast SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, and Comcast SportsNet New England, as well as the NBC Broadcasting Network. See *infra*, Appendix C, Table C-1. News Corp. also owns a number of RSNs and the Fox Broadcasting Network. See *infra*, Appendix C, Table C-2.

¹²¹⁹ See *infra*, Appendix D (this figure includes the HD feeds of the RSN networks). NCTA estimates that there were about 51 RSNs in standard, high-definition, or premium format as of 2010. NCTA, *Organizations: Cable Networks*, <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907#&&CurrentPage=1> (visited May 11, 2010).

¹²²⁰ See Chris Gratton & Harry Arne Solberg, *THE ECONOMICS OF SPORTS BROADCASTING* 83-86 (Routledge, Taylor & Francis Group) (2007) ("Gratton & Solberg").

while the network supplies on-air talent and coordination.¹²²¹ The amount of financial risk incurred by a team or league, as well as its dependence on revenues from broadcasting and cable companies, depends on the sport, the market, and the team's performance.

372. Sports programming differs from other television programs and movies in two major respects. First, audience and advertiser interest is more predictable, especially for marquis events. Major sporting events, including professional football, baseball, and basketball, the Olympics, and certain NCAA playoff series consistently generate among the highest ratings of any programming among viewers who are demographically desirable to advertisers.¹²²² Audiences,¹²²³ advertisers, and MVPDs therefore regard such sporting events as "premium" programming.¹²²⁴ Second, live sports programs have little value beyond their initial telecast since viewer interest drops substantially once the contest is over and the results known. With the exception of websites that provide opportunities for additional engagement of fans, ancillary markets for sports programming are limited.¹²²⁵

373. The licensing of sports programming for video distribution varies by sport. For example, the National Football League ("NFL") negotiates media rights exclusively on a national basis. In the NFL, each team receives an equal share of broadcast and licensing revenues and 40 percent of gate receipts from away games.¹²²⁶ Revenues earned from licensing network television rights have been especially important to the NFL. CBS, FOX, NBC, and ESPN jointly paid nearly \$25 billion for the right to air NFL games for eight years, 2006-2013, representing an increase of 42 percent from the previous eight-year agreement.¹²²⁷ The combination of the financial cushion from broadcast and cable networks contracts, the NFL's revenue sharing arrangement, and the lack of local television contracts, has means

¹²²¹ Vogel at 463, n. 6. Examples of this include the Ladies Professional Golf Association, Grand Prix auto racing, and Tour de France cycling. *Id.*

¹²²² See Wang at 15. See also Gratton & Solberg at 10 ("Sports program[ing] almost uniquely had this ability to attract the size and characteristics of audiences most attractive to distributors, sponsors, and advertisers.").

¹²²³ According to Nielsen, major sporting events are appealing to advertisers because they are more likely than other programs to attract viewers in households earning \$100,000 or more. See Nielsen, *State of the Media: Year in Sports 2010*, at 1, <http://www.nielsen.com/us/en/insights/reports-downloads/2011/year-in-sports-2010.html?status=success> (visited Mar. 27, 2012).

¹²²⁴ Wang at 15. When NBC announced that it would stream the Super Bowl in 2012, the American Television Alliance, a group representing MVPDs, argued that free streaming undercut the stations' rationale for justifying retransmission consent fees. See American Television Alliance, *Blog*, <http://www.americatelevisionalliance.org/uncategorized/new-ad-whv-is-sunday%E2%80%99s-big-game-being-streamed-for-free-online-when-broadcast-networks-and-their-affiliates-demand-sky-high-fees-to-show-their-programming/> (visited Feb. 17, 2012).

¹²²⁵ According to Nielsen, the mobile web audience among sports sites increased by 22 percent from November 2010 to November 2011. Nielsen, *State of the Media: 2011 Year in Sports* at 2, <http://www.nielsen.com/us/en/insights/reports-downloads/2012/state-of-the-media--2011-year-in-sports.html> (visited Mar. 27, 2012). In November 2011, the first full month of the NHL season, nearly 1.3 million people visited NHL.com and watched close to 10 million minutes of video content, which is 37 percent more video than was consumed in November 2010. *Id.* at 8.

¹²²⁶ Vogel at 453-54, Fig. 12.2.

¹²²⁷ SNL Kagan 2011 Media Trends at 19. ABC, which had aired NFL games for the previous 36 years, gave up the rights to its sister network, ESPN. ESPN's high subscriber fees enable it to earn higher cash flow margin than the broadcast network. For example, in 2010, ABC had \$2.9 billion in programming costs (primarily entertainment) and a cash flow margin of 1.7 percent, while ESPN had total programming costs (sports programming) of \$4.9 billion and a 25 percent cash flow margin. *Id.* at 18.

that the most profitable NFL team usually generates only 20 percent more gross revenues than the least.¹²²⁸

374. For Major League Baseball (“MLB”) and the National Basketball Association (“NBA”), revenues from licensing fees are highly correlated with the size of the market and individual team performance. The NBA and MLB allow teams to negotiate local broadcast rights contracts. For this reason, RSNs may carry professional basketball and baseball games. Traditionally, the NBA and MLB have been less dependent on television revenues than the NFL, in part because they play many more games in their home markets.¹²²⁹ In August 2010, however, the Texas Rangers signed a 20-year licensing agreement with FOX Sports Net valued at \$3 billion that includes an equity stake in the network, escalator clauses, and profit participation. This transaction has set in motion a series of negotiations between baseball teams and RSNs for major television contracts, at least for many teams in larger markets.¹²³⁰ Similarly, in February 2011, Time Warner Cable signed a 20-year, \$3 billion licensing agreement with the Los Angeles Lakers to launch English-language and Spanish-language RSNs built around the team, and other teams have subsequently signed major contracts with RSNs as well.¹²³¹

375. While the broadcast networks generally lose money on sports, the programming attracts viewers, especially with pre- and post-game programming, enabling broadcast networks to develop their brands and promote their non-sports programming schedules.¹²³² Nevertheless, since sporting events are less vulnerable than other types of programming to competition, broadcast and cable networks are paying increasingly large amounts for sports rights, supported in part by subscriber fees charged to MVPDs, and/or contributions from broadcast affiliates to cover rights and production costs. One recent trend has been the migration of some major sports, including the NBA and MLB, to cable networks.¹²³³ Cable and broadcast networks sometimes share in the bidding for sports rights. For example, in 2010 CBS and TNT jointly won a bid for the National Collegiate Athletic Association (“NCAA”) men’s basketball tournament rights, providing additional outlets for sports programming.¹²³⁴ For MVPDs, sports-themed cable networks are considered “must have” programming because their programming is unique and

¹²²⁸ Vogel at 453.

¹²²⁹ *Id.* at 454-55.

¹²³⁰ Bob Nightengale, *Cash Flows Through MLB Cable Outlets*, USA TODAY, Feb. 10, 2012, at 1C. According to Arizona Diamondbacks’ President Derrick Hall, “[i]t’s the biggest game changer a lot of us have ever seen. The landscape changed in Texas . . . You’re seeing clubs double or triple their TV value.” *Id.*

¹²³¹ Mike Reynolds, *TWC’s Lakers Deal Changes Game*, MULTICHANNEL NEWS, Feb. 21, 2011, at 8. The agreement made the Los Angeles Lakers the most valuable team within the league. Kurt Badenhausen, *L.A. Lakers Top 2012 List of the NBA’s Most Valuable Teams*, FORBES, Jan. 25, 2012, <http://www.forbes.com/sites/kurtbadenhausen/2012/01/25/the-nbas-most-valuable-teams/> (visited Mar. 13, 2012).

¹²³² SNL Kagan 2011 Media Trends at 21.

¹²³³ Deana Myers, *Sports Rights: Paying Off for Broadcast?*, SNL KAGAN, Feb. 7, 2012. See also Pete Toms, *What Does a Drop in Cable TV Subscribers Mean for MLB?*, BIZ OF BASEBALL, Nov. 29, 2010 (“Fewer and fewer games are available on local ‘over-the-air’ channels as sports continue to migrate to the more lucrative ‘dual revenue’ (sub fees and ads) model of cable TV.”), http://bizofbaseball.com/index.php?option=com_content&view=article&id=4899:twiib-what-does-a-drop-in-cable-tv-subscribers-mean-for-mlb&catid=67:pete-toms&Itemid=155 (visited Mar. 26, 2012).

¹²³⁴ *A Modified Madness*, DAILY VARIETY, Mar. 9, 2011, at 3. According to CBS Sports Chairman Sean McManus, “[w]e realized we couldn’t bid for this just as an over-the-air broadcaster . . . We needed a partner from a (number of) standpoints.” Beginning in 2011, for the first time, every game was available for viewing in its entirety. *Id.*

cannot be easily replicated.¹²³⁵ ESPN charges the highest per subscriber license fee, \$4.39 per month as of 2010, of all cable networks.¹²³⁶

376. Sports cable networks earned about \$2.2 billion in net advertising revenue in 2007, representing 25.9 percent of net operating revenues and \$2.6 billion in 2010, representing 22.8 percent in net advertising revenues, lower percentages of net operating revenue than non-sports networks as reported above. Similar to the EBITDA and operating cash flow metrics we used to measure profitability in the previous sections,¹²³⁷ broadcast and cable network cash flow margins serve as indicators of their profitability.¹²³⁸ As we noted earlier, cable networks, such as ESPN, have higher cash flow margins than broadcast television networks, such as ABC.¹²³⁹ Among cable networks, however, sports networks, both national and regional, have lower cash flow margins than general entertainment and other genres.¹²⁴⁰ For instance, ESPN, which earns 15 percent of cable network industry revenues, had a cash flow margin of 25.3 percent as of 2010, while Nickelodeon had a cash flow margin of 64.6 percent.¹²⁴¹ Sports fees have continued to rise during the recession. Between 2000 and 2010, RSN subscriber fees quadrupled from \$1 billion to \$4.2 billion. As of 2010, several MVPDs attributed expected additional increases in programming costs in part to rising fees for sports programming.¹²⁴² Some analysts question whether RSNs, ESPN, and other networks will be able to pass on the increasing costs of sports programming onto MVPDs.¹²⁴³ Given the potential for subscribers to substitute or cut back on their MPVD subscriptions, some MVPDs have decided to price sports programming on a separate tier, and others may follow suit.¹²⁴⁴

¹²³⁵ See, e.g., *News Corp-DirectTV Order*, 23 FCC Red at 3305, ¶ 87, *supra*, n. 101. For example, when Disney first considered purchasing full season NFL rights for \$8.8 billion for ESPN in 1998, CEO Michael Eisner justified the acquisition after getting a guaranteed 20 percent compounded growth rate in subscriber fees from all MVPDs. James Andrew Miller & Tim Shales, *ESPN: THOSE GUYS HAVE ALL THE FUN* 406-412 (Back Bay Books/Little, Brown & Co.) (2011). According to Comcast CEO Brian Roberts, “Michael Eisner knew that the NFL was unlike any other programming, and he used it to impose the most dramatic rate increases ever on cable customers. ESPN raised their rates more than 20 percent for seven straight years.” *Id.* at 409-10.

¹²³⁶ SNL Kagan Basic Cable Network Affiliate Revenue. In 2010, Comcast SportsNet Washington charged the next highest rate, an average of \$3.18 per subscriber per month.

¹²³⁷ See *supra*, Secs. III.A.4., III.B.4, and III.C.4.

¹²³⁸ For networks, cash flow equals total revenues (i.e., net advertising revenue, MVPD license fee revenues, and other revenue sources) minus SG&A and programming expenses. It excludes depreciation of plant property and equipment as well as amortization of goodwill. Cash flow margin equals the percentage of revenues attributable to cash flow. See SNL Kagan, *TV Network Industry Benchmarks: View Definitions*.

¹²³⁹ See *supra*, Tables 25 & 27.

¹²⁴⁰ FCC staff analysis of SNL Kagan data. See SNL Kagan, *TV Network Summary: Basic Cable Network by Net Advertising Revenue (2006 – 2010)*.

¹²⁴¹ SNL Kagan Basic Cable Report at 4, 7.

¹²⁴² Charter 2010 Form 10-K at 8; Comcast 2010 Form 10-K at 25; Insight 2010 Form 10-K at 36; Suddenlink 2010 *Annual Report* at 12; Mediacom 2010 Form 10-K at 11, 25.

¹²⁴³ Sarah Barry James, *The Danger of Specialized Sports Networks*, SNL Kagan, Oct. 24, 2011.

¹²⁴⁴ One recent example is Cox Communications’ offer of an economy package for \$35 a month that includes several basic cable networks, but excludes ESPN and RSNs. Comcast and Time Warner Cable have also tested and offered similar tiers. Deborah Yao, *Cox Rolling Out Economy Cable TV Tier*, SNL Kagan, Jan. 24, 2012, at 1-2. DISH Network, which positions itself as a low-cost MVPD (in contrast to sports-centric DIRECTV, which offers exclusive NFL Sunday Ticket programming), has reportedly considered dropping ESPN if it does not agree to be distributed on a separate sports tier, to keep prices in check for subscribers who are non-sports fans. In New York, (continued....)

2. Distribution Strategies

377. As discussed elsewhere in this Report, technology continues to evolve and provide alternative methods for the distribution, storage, and consumption of video content, such as DVR and VOD.¹²⁴⁵ Alternative distribution of video content entails an evolution of rights between the networks, affiliates, and studios as well as strategic business decisions of the parties. We now describe key examples of these evolving relationships below.

378. *Broadcast Television Programming and Network Affiliates.* The increasing availability of network programming through a variety of video distributors has impacted the relationship between networks and their affiliates. As described above, broadcast network programming is available both via MVPD VOD service and from OVD services such as iTunes and Hulu. For example, iTunes began selling broadcast network programming in 2005. Specifically, in October 2005, ABC struck an agreement with iTunes for EST for \$1.99 per episode.¹²⁴⁶ NBC followed with an iTunes agreement in December 2005 to distribute programs from NBC Universal broadcast and cable networks.¹²⁴⁷ When these networks began selling programs to iTunes, they did not have formal compensation agreements concerning these types of arrangements with their broadcast television affiliates in place.¹²⁴⁸ Many affiliates were displeased that the networks had neither apprised them nor sought their permission prior to striking the deal with iTunes.¹²⁴⁹ NBC offered iTunes more programs than ABC, in part because its affiliation agreements allowed redistribution of more in-season programs, while ABC's affiliation agreements limited it to redistribute only 25 percent of its prime time schedule.¹²⁵⁰

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DISH Network has dropped three RSNs – SportsNet New York, YES, and MSG Plus. DISH Network CEO Charlie Ergen has stated that if only 15 percent of subscribers in a market actually watch sports programming, it may be a good idea for one of the MVPDs not to carry RSNs. Derek Baine, *Dish to Dump ESPN?*, SNL Kagan, Sept. 13, 2011, at 11.

¹²⁴⁵ See, e.g., News Corp. 2010 Form 10-K at 33; Time Warner 2010 Form 10-K at 18.

¹²⁴⁶ The agreement also covered series from the Disney Channel. The Walt Disney Co., *Disney, ABC & Apple Announce Deal to Sell TV Shows Online: Hits to Include "Desperate Housewives," "Lost," and "That's So Raven"* (press release), Oct. 12, 2005.

¹²⁴⁷ Apple Inc., *NBC Universal & Apple Offer New Primetime, Cable, Late-Night & Classic TV Shows on the iTunes Music Store* (press release), Dec. 6, 2005. Sales from iTunes sales breathed new life into NBC's *The Office*. While the show was not a primetime hit as of January 2006, it often took up half the slots of Apple's lists of top 20 television episodes for sale on iTunes. Josef Adalian, *Peacock Preening with iTunes Presence*, DAILY VARIETY, Jan. 3, 2006 at 1.

¹²⁴⁸ Glen Dickson, *Broadcasters Cut Out of Convergence*, BROADCASTING & CABLE, Jan. 16, 2006, at 38. CBS, however, agreed to provide a share of revenues to affiliates when it reached a distribution agreement with Google. *Id.*

¹²⁴⁹ Michele Greppi, *ABC Affils Remain Uneasy: Network Does Little to Erase Concerns Raised by iPod Pact*, TELEVISION WEEK, Oct. 24, 2005, at 5. ABC claimed that Disney's non-disclosure agreement with Apple prevented it from doing so. Andrew Wallenstein & T.K. Arnold, *Disney-Apple Pact Upsets Affiliates*, THE HOLLYWOOD REPORTER, Oct. 13, 2005. Likewise, ABC did not believe a prior agreement it reached with affiliates to limit the amount of programming it redistributed applied to iTunes. Michele Greppi, *Affils Slighted by Big 3's VOD Deals: Stations Want Info on How Revenues Will be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵⁰ Josef Adalian, *Peacock Preening with iTunes Presence*, DAILY VARIETY, Jan. 3, 2006 at 1. Years earlier, ABC, CBS, and FOX had reached agreements with affiliates that gave affiliates additional advertising spots in network programming and/or other revenue-sharing opportunities in exchange for allowing the networks to redistribute a limited amount of network programming in-season and on a nationwide basis. In return, the affiliates helped defray the networks' costs for sports rights. Michele Greppi, *Affils: Exclusivity is Dead*, TELEVISION WEEK, Apr. 17, (continued....)

379. Broadcast networks subsequently reached comprehensive agreements with their affiliates that specifically addressed alternative forms of distribution, such as iTunes and MVPD VOD services.¹²⁵¹ In 2006, FOX and its affiliates reached a six-year agreement, allowing the network to repurpose more programming per week on alternative media, including iTunes, websites, and VOD, making it available for viewing the morning after the show originally aired on broadcast television stations.¹²⁵² Stations had the right to share in revenues.¹²⁵³ This marked the first agreement between a broadcast network and its affiliates to extensively address distribution of broadcast network programming via VOD, OVDs, and FOX's website, FOX.com.

380. Other networks followed suit. In June 2006, CBS reached an agreement with affiliates allowing it to repurpose network programming on VOD, on its CBS.com website (formerly called "Innertube"), as well as other digital outlets.¹²⁵⁴ The agreement also provided affiliates with a share of the revenues generated by these ventures for three years. In exchange, affiliates agreed to continue to defray CBS' costs of acquiring the rights to NFL broadcasts.¹²⁵⁵ In September 2006, CBS and Comcast modified their VOD agreement to include eight CBS prime time programs distributed nationwide, with advertisements, at no additional cost to Comcast subscribers.¹²⁵⁶

381. In the summer of 2006, ABC became the first broadcast network to stream full episodes of its programs, with limited commercials, on its website, ABC.com, and initially limited online distribution of its programs to its own site.¹²⁵⁷ It allowed affiliates to incorporate ABC's video player in their own sites, and sell advertising within the episodes.¹²⁵⁸ In February 2008, ABC reached an

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2006, at 1. As of 2006, NBC was the only one of the four major networks that did not have a written agreement with affiliates setting forth terms of redistribution of its network programming. *Id.* When these agreements first became prevalent in the 1990s, NBC was decreasing its reliance on professional sports programming. Michele Greppi, *Affils Slighted by Big 3's VOD Deals: Stations Want Info on How Revenues Will Be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵¹ While broadcast stations negotiate for retransmission consent for MVPD carriage of their signals, including broadcast network programming, the networks, subject to contractual rights with content creators, negotiate with MVPDs for VOD rights. Comcast 2010 Form 10-K at 5.

¹²⁵² Michael Schneider, *Fox Expands Playing Field for Content*, DAILY VARIETY, Apr. 13, 2006. The amount grew from 60 percent of FOX's prime time lineup the first year, to 80 percent the second year, to 100 percent the third year. *Id.* See also Michele Greppi, *Sly Fox's Win-Win Web Pact; New Media Deal Gives Net On-Demand Freedom, Affils a Cut: CBS Eyes Similar Scenario*, TELEVISION WEEK, Apr. 17, 2006, at 1.

¹²⁵³ The agreement was limited and only allowed affiliates to share revenues with FOX from programming made available via MVPD VOD service or on OVD sites. Michele Greppi, *Sly Fox's Win-Win Web Pact; New Media Deal Gives Net On-Demand Freedom, Affils a Cut: CBS Eyes Similar Scenario*, TELEVISION WEEK, Apr. 17, 2006, at 1. See also Allison Romano, *Affiliates Fight for Slice of Platform Pie*, BROADCASTING & CABLE, May 15, 2006, at 17.

¹²⁵⁴ *Mass Media Notes*, COMM. DAILY, June 30, 2006.

¹²⁵⁵ *Id.*

¹²⁵⁶ Comcast Corp., *Comcast and CBS Introduce Free On Demand Episodes of Primetime CBS Shows for Comcast Digital Cable Customers* (press release), Sept. 14, 2006. The VOD offerings excluded local commercials, which are often more time-sensitive than network commercials. Michele Greppi, *Affils Slighted by Big 3's VOD Deals: Stations Want Info on How Revenues Will Be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵⁷ Chuck Salter, *Brave New Mouse*, FAST COMPANY, June 1, 2007, at 79. See also Abbey Klaassen, *Revved-Up Video*, ADVERTISING AGE, Sept. 11, 2006, at S-1.

¹²⁵⁸ Chuck Salter, *Brave New Mouse*, FAST COMPANY, June 1, 2007, at 79.

agreement with its affiliates enabling it to distribute ABC network content anytime via VOD as well as electronic sell-through services, such as iTunes and Microsoft's Zune service on its Xbox game consoles.¹²⁵⁹ The agreement allowed affiliates to participate through local advertising sales opportunities.¹²⁶⁰ In October 2008, ABC and Verizon made select ABC prime time programs available to Verizon FiOS customers nationwide.¹²⁶¹

382. In April 2006, NBC and its affiliates formed a joint venture, called National Broadband Company. National Broadband Company, which began operating in September 2006, was a wholesale service that distributed clips of videos produced by the affiliates, NBC Universal, and some third parties to the websites of the participating media companies.¹²⁶² In July 2007, however, NBCU announced that it would shut down the service in order to focus on Hulu.¹²⁶³ In 2010, NBC reached an agreement with its affiliates to offer them branding and advertising availabilities on post-network distribution of NBC entertainment and sports programs on Hulu as well as other platforms.¹²⁶⁴

383. *Creators.* The availability of network television programming also involved negotiations between networks, studios, and talent unions. Disagreement over compensation arrangements from alternative systems of distribution led to the strike of the Writers Guild of America ("WGA") during the 2007-2008 television season.¹²⁶⁵ For instance, with respect to the programming agreements with iTunes, the networks and studios claimed that iTunes fell into the category of "home video" rather than subscription television, and therefore entitled the unions to a lower residual rate, while the guilds felt that

¹²⁵⁹ The Walt Disney Co., *ABC and Affiliates Reach Unprecedented Arrangement to Expand* (press release), Feb. 25, 2008.

¹²⁶⁰ Each affiliate had the opportunity to insert one locally sold, 30-second commercial spot within each half-hour of programming in DMAs where ABC programming was available via VOD. *Id.*

¹²⁶¹ Verizon Communications Inc., *Disney-ABC Television Group and Verizon FiOS TV Expand ABC's Video-on-Demand Offering* (press release), Oct. 28, 2008.

¹²⁶² The affiliates owned about 30 percent of the joint venture. Seth Sutel, *NBC Launches Online Video Venture, Hoping to Reclaim Viewers*, ASSOCIATED PRESS, Sept. 12, 2006. Third party participants included CBS's College Sports Television and the Sundance Channel. At the time of the launch, NBC Universal Television Group executives stated that while the venture would initially distribute clips, it would be open to showing full-length episodes if demand existed. Michael Learmonth, *NBC U Bows Online Service*, DAILY VARIETY, Sept. 13, 2006, at 6.

¹²⁶³ At the time, Hulu, still in the planning stages, had the working name "New Site." Katy Bachman, *NBCU to Affils.: NBBC to Shut Down, Fold Into New Site*, MEDIA WEEK, July 5, 2007. See also Katy Bachman, *Affils Wary of "New Site": NBCU Says Alternative is Better Than Shattered NBBC*, MEDIA WEEK, July 9, 2007, at 6.

¹²⁶⁴ The NBC affiliates reached an agreement with Comcast and NBC Universal on June 3, 2010 (the "NBC Affiliates Agreement"). A copy of the NBC Affiliates Agreement was submitted to the Commission on August 6, 2010, in the Comcast-NBC Universal transaction. See Letter from Michael H. Hammer, Counsel for Comcast and David H. Solomon, Counsel for NBC Universal, Inc., MB Docket No. 10-56, to Marlene H. Dortch, Secretary, FCC (Aug. 6, 2010). See NBC Affiliates Agreement at Section 9.

¹²⁶⁵ Julia M. Scott, *WGA Strike: Act I Both Sides Settle in for Long Battle Over Revenue*, DAILY NEWS (Los Angeles), Nov. 6, 2007, at A1. See also Sarah McBride & Rebecca Dana, *Scenes from Next Week...?*, WALL ST. J., Nov. 1, 2007.

this decision violated their collective bargaining agreements.¹²⁶⁶ Ultimately the WGA obtained higher residuals for online distribution.¹²⁶⁷

384. *Studios.* Studios attribute the decline in DVD sales to several factors, including the general economic downturn, the availability of subscription services and discount kiosks, the maturation of the standard definition DVD format, piracy, and the declining popularity of catalog titles.¹²⁶⁸ This loss in revenues is partially offset by the growing sales of Blu-ray discs and EST of movies via OVDs.¹²⁶⁹ Moreover, revenues from MVPDs' VOD services have grown since 2007, from \$674 million, representing 2.8 percent of motion picture studios' total domestic revenue, to \$1.2 billion in 2010, representing 4.9 percent of motion picture studios' total domestic revenues.¹²⁷⁰ For a studio, a pay-per-view VOD transaction is about seven times more profitable than a DVD rental transaction at a discount kiosk such as Redbox or from a subscription service such as Netflix, while an electronic sell-through transaction is 20 to 30 times more profitable.¹²⁷¹ The decline in DVD sales has diminished the leverage of large retailers¹²⁷² over the distribution of content; they can no longer insist on a prolonged period of exclusivity for home video releases.¹²⁷³ The number of movies released simultaneously on VOD and DVD tripled from 10 films in 2007 to more than 30 movies in 2008.¹²⁷⁴ According to an SNL Kagan study, movies in 2010 were released on pay-per-view VOD an average of just four days after they were available on DVD, down from 19 days in 2009, 31 days in 2008, 34 days in 2007, and 38 days in 2006.¹²⁷⁵

385. *Recent Developments.* In 2010, the Media Bureau waived the prohibition, under limited circumstances and conditions, on the use of selectable output controls for early-release films for Motion Picture Association of America ("MPAA") member companies and their MVPD partners.¹²⁷⁶ Since then,

¹²⁶⁶ At the time the networks and studios began distributing content online, the guilds did not have a formal agreement in place that specifically covered these methods of distribution. Dave McNary & Ben Fritz, *Download Drama: iPod Residual Battle Bubbles Up*, DAILY VARIETY, Feb. 27, 2006, at 1. Rather than wait to see how the distribution of content online developed, as they did for DVD home video sales in the 1980s, the unions wanted to work out advantageous terms early. Dave McNary & Ben Fritz, *The Pod Thickens: Guilds Mull Dramatic Move on Residuals*, DAILY VARIETY, Feb. 27, 2006, at 5.

¹²⁶⁷ David Carr, *Who Won the Writers Strike?*, N.Y. TIMES, Feb. 12, 2008, at 1. The WGA agreement was modeled after an agreement between studios and the Directors Guild of America ("DGA"). Claudia Eller & Richard Verrier, *Hollywood Writers Strike Ends*, L.A. TIMES, Feb. 13, 2008.

¹²⁶⁸ Time Warner 2010 Form 10-K at 24, 41; Lionsgate 2010 Form 10-K at 7; Viacom 2010 Form 10-K at 39.

¹²⁶⁹ Time Warner 2010 Form 10-K at 41.

¹²⁷⁰ Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept. 26, 2011. 2010 VOD figures differ from the chart due to the inclusion of international figures by a major distributor in SNL Kagan's initial tally. Table 26 contains corrected figures provided by SNL Kagan to Media Bureau staff.

¹²⁷¹ Time Warner Presentation Transcript at 4.

¹²⁷² Such DVD retailers include Wal-Mart (owner of Vudu), Best Buy (owner of CinemaNow), and Target.

¹²⁷³ Julia Boorstin, *Warner Brothers Starts to Collapse Movie Distribution Windows*, CNBC.COM, Sept. 30, 2009, http://www.cnbc.com/id/33091887/Warner_Brothers_Starts_to_Collapse_Movie_Distribution_Windows (visited Mar. 27, 2012).

¹²⁷⁴ Tuna N. Amobi, *Industry Surveys: Movies & Entertainment*, STANDARD & POOR'S, Mar. 18, 2010, at 16.

¹²⁷⁵ Wade Holden, *Video-to-PPTVOD Window Disappears in 2011*, SNL Kagan, Dec. 21, 2011.

¹²⁷⁶ See Motion Picture Association of America, *Petition for Expedited Special Relief: Petition for Waiver of the Commission's Prohibition on the Use of Selectable Output Control*, CSR-7947-Z., MB Docket No. 08-82, (continued....)

movie studios have experimented with releasing movies in theaters and on VOD simultaneously, in a “premium VOD” window, but their strategies vary.¹²⁷⁷ While independent studios IFC Films and Magnolia make simultaneous VOD and theater part of their standard distribution plans, studios releasing major movies are hesitating, in part because of the concern about cannibalizing revenues from the theatrical release window, as well as resistance from theater owners.¹²⁷⁸ Theater owners have threatened to pull movies if studios choose to release a movie in VOD too close to the theatrical release,¹²⁷⁹ and several major theater chains have refused to book movies that are released simultaneously on VOD.¹²⁸⁰

386. CBS and Disney have struck multi-year, comprehensive distribution agreements with Comcast that include their cable networks, broadcast networks, stations, and studios in Comcast’s TV Everywhere and VOD initiatives. CBS’s 10-year agreement with Comcast, reached in August 2010, provides for expanded VOD and online access, via Comcast’s site, to programming from the CBS broadcast network and sister cable networks.¹²⁸¹ Disney’s agreement with Comcast, reached in January 2012, also enables Comcast’s Xfinity customers to watch ABC shows live, on demand, and across multiple screens.¹²⁸² The agreement covers Disney’s cable networks, ABC, and ABC’s O&Os.¹²⁸³ Premium networks, including HBO and Showtime, in conjunction with MVPDs offer subscribers unlimited access to television programs, movies, and sporting events on PCs and mobile devices through

(Continued from previous page)

Memorandum Opinion and Order, 25 FCC Rcd 4799, ¶ 1 (MB 2010). This waiver of Section 76.1903 of the Commission’s rules allows MVPDs to disable certain audiovisual outputs on set-top boxes to ensure that copy protection is available for early-release movies. The waiver terminates for a particular movie 90 days after the first activation of the selected output control, or immediately upon the retail release of the film on any prerecorded media (including Blu-ray), whichever is sooner. In addition to MPAA member companies and their MVPD partners, any other similarly situated provider of first-run theatrical content may take advantage of this waiver by filing an Election to Participate with the Commission. *Id.* at 4805-06, 4808, ¶¶ 13, 18.

¹²⁷⁷ Typically, VOD revenues are 10 percent of box office revenues. Deana Myers, *Premium VOD Draws Healthy Results for ‘Margin Call’*, SNL Kagan, Nov. 18, 2011. In the fall of 2011, Lionsgate distributed the movie *Margin Call* in theaters and VOD for the price of \$6.99, theorizing that audiences in smaller markets might be less inclined or able to watch it in theaters, earning \$5.1 million in theatrical revenues and more than \$4 million in VOD revenues. Sarah Barry James, *Lionsgate Exec Opens Up About New Windows, Summit Deal*, SNL Kagan, Jan. 30, 2012. See also Pat Saperstein, *‘Margin Call’ Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012). Some industry executives consider the results of Lionsgate’s experiment with *Margin Call* to be a “game changer.” *Id.*

¹²⁷⁸ Pat Saperstein, *‘Margin Call’ Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012).

¹²⁷⁹ Deana Myers, *Premium VOD Draws Healthy Results for Margin Call*, SNL Kagan, Nov. 30, 2011. For example, Universal Studios halted its plan to make the movie *Tower Heist* available via VOD three weeks after its theater debut after resistance from theater owners. David Lieberman, *Universal Halts ‘Tower Heist’ VOD Plan as Exhibitors Agree to Further Talks*, DEADLINE, Oct. 12, 2011, <http://www.deadline.com/2011/10/universal-halts-tower-heist-vod-plan/> (visited Mar. 6, 2012).

¹²⁸⁰ Pat Saperstein, *‘Margin Call’ Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012).

¹²⁸¹ CBS Corp., *CBS and Comcast Sign Ten-Year Content Carriage Agreement* (press release), Aug. 2, 2010.

¹²⁸² Comcast Corp., *The Walt Disney Company and Comcast Corporation Announce a Long-Term, Comprehensive Distribution Agreement that Advances the Successful Multichannel Business Model* (press release), Jan. 4, 2012.

¹²⁸³ *Id.*

their own branded web sites and mobile applications.¹²⁸⁴ At the same time, some cable programming networks are taking a more cautious approach. For example, as of February 2012, the Discovery Networks has chosen not to give TV Everywhere rights to any MVPD.¹²⁸⁵ TV Everywhere initiatives have sometimes caused tensions between networks and MVPDs. For example, Time Warner Cable withdrew live streams of content from Viacom, Discovery, and News Corp. from its live television iPad app after the companies objected.¹²⁸⁶

387. Industry observers expect that a November 2011 agreement between WBTVG and ABC may become a template for other studios and networks regarding the distribution of television programs.¹²⁸⁷ Under this agreement, WBTVG will be able to syndicate its shows three years after they have had their first-run on the ABC network, rather than the traditional four years.¹²⁸⁸ WBTVG also can sell distribution rights to ABC-aired shows to subscription services, such as Netflix and Hulu, after the completion of each season. In exchange, ABC has the right to simulcast the network feeds of this WBTVG programming to any device, including tablets. ABC can distribute a maximum of five of the most recently aired episodes via an MVPD's VOD service or an OVD for a 30-day period at any time. Under this agreement, ABC retains all the revenue from advertising-supported streaming OVDs, such as Hulu. At the same time, the studio keeps revenues from in-season electronic sell-through platforms, such as iTunes, that enable consumers to own rather than rent episodes, as well as out-of-season DVD and Blu-ray disc sales.¹²⁸⁹ In addition, ABC retains revenues from any OVD subscription service in which it has an ownership interest, such as Hulu Plus.

B. Consumer Premises Equipment

388. Changes in consumer premises equipment ("CPE") technology have an important impact on competition in the video programming market. CPE is the necessary means by which consumers access the services that broadcasters, MVPDs, and OVDs provide. Because CPE is an integral part of viewing video programming, CPE features such as recording, home networking, and user interface are factors to consumers when choosing their programming provider and which services to purchase. Further, interoperability of CPE can impact the ability to consumers to seamlessly switch providers. In this section, we report on a number of developments in this area that affect the manner and state of competition in the video marketplace. We specifically note, where possible, developments since the last report, and examine the technological, regulatory and market developments that have had an effect on or are likely in coming years to affect competition in the video market. We begin by summarizing

¹²⁸⁴ See CBS Corp., *Showtime — Apps*, <http://www.sho.com/sho/apps> (visited Mar. 27, 2012); Time Warner Inc., *What is HBO Go*, <http://www.hbogo.com/#whatis> (visited Mar. 27, 2012). See also, e.g., Comcast 6/8/11 Comments at 12-14; Bright House Networks, *HBO and Cinemax Now Available "On the Go" to Bright House Networks Customers* (press release), Jan. 10, 2012.

¹²⁸⁵ Discovery Presentation Transcript at 7. Discovery has indicated it may reconsider this decision at a later date.

¹²⁸⁶ Brian McNeill, *Time Warner Cable Removes Programming from iPad App Following Cable Network Complaints*, SNL Kagan, Mar. 31, 2011.

¹²⁸⁷ Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie*, *Digital Rules*, DAILY VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062> (visited Mar. 26, 2012). While trade publications may refer to Warner Brothers Television Group as "WBTV," Time Warner, Inc. uses the acronym "WBTVG."

¹²⁸⁸ WBTVG Executive Vice President Craig Hunegs said that cable networks and broadcast stations have requested access to off-net syndicated programming earlier. *Id.*

¹²⁸⁹ Time Warner Inc., *ABC Entertainment and Warner Bros. Television Group Reach New Digital Distribution Agreement* (press release), Nov. 14, 2011.

navigation device developments by MVPDs and by non-affiliated vendors. We then review developments in devices used to access online video and mobile video services.

I. CPE Used to Access MVPD Services.

a. Leased CPE

389. MVPDs have been deploying set-top boxes that allow consumers to move content among other MVPD-provided set-top boxes in the home and incorporating cable modems into set-top gateways. MVPDs are also providing video to portable screens, such as Internet-connected smart phones and tablet computers. Cable companies continue to support CableCARD and, as described in more detail below, are working to implement an IP based recordable output.¹²⁹⁰

390. MVPDs have widely begun deploying multi-room DVR and home networking solutions. Comcast's "AnyRoom DVR," AT&T's "Total Home DVR," and DIRECTV's "Whole Home DVR" are current examples of MVPD-provided services that move recorded video content among MVPD-provided set-top boxes in the home. DIRECTV's multi-room DVR provides full DVR capabilities on other DIRECTV set-top boxes connected to a central HD DVR in a consumer's home.¹²⁹¹ Similarly, DISH Network's DuoDVR receivers allow two independently controlled televisions to be connected to the same set-top box.¹²⁹² In addition, DISH Network's TV Everywhere service streams video from a consumer's set-top box via IP to a remote computer, mobile device, or "WiFi Monitor."¹²⁹³ The DISH Network WiFi Monitor is a portable HD monitor with built-in wi-fi and a streaming receiver. This remote viewing service works both inside and away from the consumer's home.

391. Some MVPDs are deploying cloud-based user interfaces that take advantage of IP connectivity in leased set-top boxes. For example, Comcast's Xfinity TV uses a cloud-based interface that allows subscribers to search content from live television, on demand, or on their DVRs, in addition to providing access to weather and traffic applications, and social networking features.¹²⁹⁴ Comcast has also begun a trial of a more robust IP based program guide and video delivery platform that targets delivery to IP enabled devices.¹²⁹⁵ Time Warner has started to implement a cloud-based user guide providing

¹²⁹⁰ See *infra*, ¶¶ 393, 395. In 2004, the Commission adopted a requirement that cable operators provide an IEEE 1394 interface on all high definition set-top boxes as a means of enabling a market for devices which interact with the operator supplied set-top box. In 2010, the Commission relaxed this requirement to permit operators to provide the same functionality over IP. IP has overwhelming marketplace support and serves the same purpose that our IEEE 1394 connection requirement was intended to serve. See *Navigation Devices Third Report and Order*, 25 FCC Red 14677-79, ¶¶ 39-44.

¹²⁹¹ See DIRECTV, *DIRECTV: Whole Home DVR*, http://www.DIRECTV.com/DIVAPP/content_technology/wholehome?footermatype=-1&lpos=header (visited Nov. 10, 2011).

¹²⁹² DISH Network, *DISH Network Introduces TV Everywhere* (press release), Jan. 6, 2010.

¹²⁹³ DISH Network 7/29/09 Comments at 5.

¹²⁹⁴ Letter from Michael Powell, NCTA President and CEO, to Julius Genachowski, Chairman, FCC, MB Docket 07-269 (July 7, 2011) at 4 ("Letter from Michael Powell").

¹²⁹⁵ See Jessica E. Vascellaro, *Comcast Test Tech Overhaul*, May 26, 2011, <http://online.wsj.com/article/SB10001424052702304066504576345330551958642.html> (visited Mar. 6, 2012).

improved search and navigation features through its set-top boxes equipped with a DOCSIS IP connection.¹²⁹⁶

392. Additionally, MVPDs have been working on ways to expand access to their services by retail products.¹²⁹⁷ For example, DIRECTV is a founding member of the “RVU Alliance,” which has developed open-standard technology that permits the distribution of video programming directly to televisions and other devices throughout the home from IP-enabled gateway devices. Portable media players, gaming consoles, and Internet-connected smart phones and tablet computers have become popular ways to interact with video as well. While an increasing number of these devices can access many MVPD services, the AllVid Tech Alliance asserts that few devices from non-affiliated vendors can access MVPD services.¹²⁹⁸

b. CableCARDS and Section 629 of the Communications Act

393. Pursuant to Section 629 of the Act,¹²⁹⁹ the Commission adopted regulations to assure the commercial availability of consumer electronics equipment that can access MVPD services.¹³⁰⁰ In enacting the section, Congress pointed to the vigorous retail market for CPE used with the telephone network and sought to create a similarly vigorous market for devices used with MVPD services.¹³⁰¹ The Commission has made regulatory efforts to develop this market and continues to analyze marketplace developments.

394. In 2003, the Commission adopted CableCARD standards that make cable service compatible with consumer electronics devices.¹³⁰² These standards direct cable operators to separate the

¹²⁹⁶ Mike Robuck, *Time Warner Cable Sheds Light on Cloud-Based Guide*, CED, Oct. 27, 2011, <http://www.cedmagazine.com/blogs/2011/10/time-warner-cable-sheds-light-on-cloud-based-guide> (visited Oct. 31, 2011).

¹²⁹⁷ Some MVPDs have announced or demonstrated products that integrate their video content with televisions from Samsung, LG, and Sony, gaming consoles from Sony and Microsoft, and smartphones and tablets running Apple’s iOS or Google’s Android platform. See Letter from Michael Powell at 2-7. See also AT&T 7/8/11 Reply at 4-5 (regarding compatibility with Microsoft’s X-Box 360).

¹²⁹⁸ See Letter from Robert S. Schwartz and Jeffrey L. Turner, Counsel, AllVid Tech Company Alliance *et al.*, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-91 (July 27, 2011) at 8. NCTA disputes the AllVid Tech Alliance’s assertion that contracts between MVPDs and device manufacturers “affiliate” the two parties. Letter from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Sherrese Smith, Senior Counsel and Legal Advisor to the Chairman, FCC, MB Docket No. 10-91 (Aug. 10, 2011) at 3, n.8.

¹²⁹⁹ See 47 U.S.C. § 549 (“The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.”).

¹³⁰⁰ 47 U.S.C. § 549(a).

¹³⁰¹ H.R. REP. NO. 104-204, at 112-3 (1995).

¹³⁰² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Red 20885 (2003).

conditional access¹³⁰³ functions of a set-top box from the box's other functions, like tuning and guide rendering (*i.e.*, drawing the image you see when you push the "guide" button on your remote).¹³⁰⁴ This separation requirement is commonly referred to as the "integration ban." CableCARDs permit the reception of digital cable programming via commercially available devices without using a cable operator supplied set-top box. Consumers, however, must obtain a CableCARD from their local cable operator to insert into digital television sets, competitive set-top boxes (*e.g.*, TiVo) or other devices they have purchased at a retail outlet. While the CableCARD-compatible devices available at retail today are only capable of receiving one-way cable service, operator-supplied set-top boxes using CableCARDs are capable of two-way communication with the headend.¹³⁰⁵

395. Despite the CableCARD standards, consumer adoption of retail CableCARD-compatible devices has not matched the Commission's expectations.¹³⁰⁶ The following table shows the reported number of CableCARD deployments for use in retail CableCARD-enabled devices since 2006¹³⁰⁷ and the deployment of operator-supplied set-top boxes with CableCARDs since the integration ban went into effect on July 1, 2007.¹³⁰⁸

¹³⁰³ "Conditional access" is the method that cable operators use to make sure that cable subscribers only receive the programming to which they subscribe.

¹³⁰⁴ See generally 47 C.F.R. §§ 76.640, 76.1204.

¹³⁰⁵ The Commission's CableCARD rules standardized what was necessary to make retail devices compatible with cable system conditional access systems nationwide and to tune digital linear programming channels. The Commission deferred standardization of technology necessary for navigation devices to communicate upstream to the headend to request two-way services like video-on-demand, pay-per-view, or switched digital video, but some cable operators have negotiated with TiVo privately to provide on-demand services to retail TiVo set-top boxes. Harry McCracken, *TiVo Gets Comcast's Xfinity on Demand*, TIME, Apr. 9, 2012, <http://techland.time.com/2012/04/09/tivo-gets-comcasts-xfinity-on-demand/> (visited May 3, 2012); Letter from Natalie G. Roisman, Counsel to Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed Oct. 8, 2010).

¹³⁰⁶ *Navigation Devices Third Report and Order*, 25 FCC Rcd at 14660, ¶ 4.

¹³⁰⁷ The Commission directed certain cable operators to file reports with the Commission detailing CableCARD deployments. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, 6814-15, ¶ 39 (2005) ("2005 Deferral Order").

¹³⁰⁸ Effective July 1, 2007, cable operators were required to separate security in their leased devices and rely on the same conditional access mechanism that consumer electronics manufacturers use in their commercially available devices. 47 C.F.R. § 76.1204(a)(1). See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924, 7926 ¶ 4 (2003); *2005 Deferral Order*, 20 FCC Rcd at 6802-03 ¶ 13.

Table 29: Deployment of CableCARDS (Cumulative)¹³⁰⁹

Year (as of June)	CableCARD Deployment for Use in Retail Devices – Top 10 Cable Operators	Operator-supplied Set-top Boxes With CableCARDS
2006	170,000	
2007	271,000	
2008	372,000	6,232,800
2009	437,800	14,085,000
2010	520,000	21,000,000
2011	582,000	29,300,000

396. While our CableCARD rules have allowed vendors like TiVo and Hauppauge to build retail devices that connect to cable systems, the cable industry criticizes the CableCARD regime as expensive and ineffective.¹³¹⁰ Non-cable MVPDs insist that CableCARDS are too cable-centric, and that future standards should consider that their systems differ from cable systems.¹³¹¹ According to certain public interest and local government entities, disagreement in the industry about the best mechanism to achieve a competitive retail market for CPE devices has limited the choices available to consumers.¹³¹²

397. In October 2010, the Commission adopted rules to eliminate four impediments to consumer adoption of CableCARDS, including rules that: (1) ensure that retail devices can access all video programming that is prescheduled by the programming provider; (2) increase transparency in CableCARD pricing and billing; (3) streamline CableCARD installation; and (4) streamline requirements for manufacturers who build CableCARD devices.¹³¹³ In the same order the Commission replaced the IEEE 1394 connector that was meant to be a recordable digital output from MVPD leased set-top boxes with an IP based open-standard connection with certain requirements in service discovery, video transport, and remote command pass-through for home networking. Beginning December 1, 2012, cable operators must deploy set-top boxes that meet the IP-based output requirement. Once that requirement takes effect, retail-purchased CPE will be able more effectively to network with and view content from MVPD-provided devices.

¹³⁰⁹ See Letters from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed June 29, 2006, June 25, 2007, June 23, 2008, June 26, 2009, June 23, 2011, June 30, 2011).

¹³¹⁰ See, e.g., NCTA 5/20/09 Comments at 40.

¹³¹¹ Verizon 5/20/09 Comments at 29-31; DISH Network 6/20/09 Reply at 10-11.

¹³¹² Free Press 8/28/09 Reply at 6-9; Montgomery County, MD 5/20/09 Comments at 21-23.

¹³¹³ *Navigation Devices Third Report and Order*, 25 FCC Red at 14662-14676, ¶¶ 8-38.

c. CableCARD Successors

398. The Commission and industry have undertaken several efforts to update, extend, or replace the CableCARD regime.¹³¹⁴ Most recently, the Commission has begun exploring a replacement concept referred to as “AllVid.” The *AllVid NOI* introduced the concept of an adapter that could act either as a small “set-back” device for connection to a single smart video device or as a gateway allowing all consumer electronics devices in the home to access multichannel video programming services in addition to any other services the devices might have access to.¹³¹⁵ Unlike CableCARD technology, this adapter could support the development and marketing of retail smart video devices that attach to any MVPD service anywhere in the United States. Such an approach could greatly enhance the incentives for manufacturers to enter the retail market. As conceived, an MVPD would supply an adapter that would communicate with the MVPD service, perform the tuning and security decryption functions that may be specific to that particular MVPD, and deliver video to retail devices using a common home networking protocol. In this manner, a retail smart video device would be able to integrate MVPD and non-MVPD services, perform navigation functions, including the presentation of programming guides and search functionality. The Commission is continuing to monitor and evaluate the market for devices that can access MVPD services.

2. CPE Used to Access OVD Services

399. Increased broadband speeds will allow consumers to receive IP-delivered video content within the home across multiple broadband-capable devices, game consoles, and standalone devices like those provided by Apple, Roku, Boxee, and Google.¹³¹⁶ These devices allow users to navigate and receive video delivered via broadband Internet and display it on a television monitor. In the OVD section of this Report, we note that many of the leading OVDs make their services available via a wide variety of consumer electronics products. The converse is also true – many consumer electronics products give consumers access to a variety of OVD services.

400. Vendors have also begun to integrate and blend linear television service from MVPDs and broadcasters with OVD services. For example, Boxee’s LiveTV is a digital television tuner peripheral that connects to Boxee’s media player, where the over-the-air broadcast television signals are presented to consumers alongside OVD services.

3. Handheld and Mobile Video Devices

a. Mobile IP Devices

401. The proliferation of portable media devices with broadband IP capability has opened up new video distribution opportunities for MVPDs and OVDs alike. Devices such as laptops, netbooks, smartphones and media tablets all have IP connections and high resolution screens for consumers to watch video. Gartner, Inc. projects that over 100 million media tablets will be sold worldwide by the end

¹³¹⁴ One such effort undertaken by industry is called Tru2way, previously called the Open Cable Applications Platform. While consumer electronics manufacturers have been reluctant to implement tru2way in retail devices, cable operators may continue to support Tru2way for their own internal purposes. See Todd Spangler, *Comcast New Way on Tru2way*, MULTICHANNEL NEWS, June 14, 2010, <http://www.multichannel.com/article/453729-Comcast-New-Way-on-Tru2way.php> (visited Mar. 6, 2012).

¹³¹⁵ *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, Notice of Inquiry, 25 FCC Red 4275, 4281-3, ¶¶ 17-23 (2010).

¹³¹⁶ Comcast 7/8/11 Reply at 4-5.

of 2012.¹³¹⁷ The number of smartphones with 4G connectivity is on the rise as well, which enables video providers to potentially deliver high quality video to viewers.¹³¹⁸ To access the mobile IP market, MVPDs have begun making their video content accessible over a host of portable devices. For example, Comcast's XFINITY TV service provides on-demand video to laptops, smartphones, and tablets.¹³¹⁹ DIRECTV's "nomad" service allows consumers to copy recordings from their HD DVR to their phones, laptops, or tablets for viewing without an active network connection. To facilitate these services, MVPDs and programmers are looking to cloud-delivery mechanisms for IP connected devices including, tablets, smartphones, televisions, laptops, and other mobile devices.¹³²⁰

b. Specialty Mobile Devices

402. For the purposes of this Report, specialty mobile devices are those that include specialized hardware to receive mobile video services from the mobile provider's network, as opposed to those that receive mobile video via the Internet. Such devices often have the advantage that they are served by a broadcast or point-to-multipoint system, so they do not consume data from a data plan, and many devices can receive content simultaneously in a crowded location such as a stadium or arena. However, the specialized hardware needed to access the mobile video services requires vendors to design devices for a specific service, potentially restricting the number of services that can be accessed by a device, and diminishing the willingness of vendors to build devices that support the service.

403. Since the last report, mobile providers have continued to experiment in ways to send broadcast video programming to mobile devices. For example, MediaFLO was an attempt by Qualcomm to broadcast video to mobile devices. MediaFLO receivers were built into a range of Verizon Wireless handsets, which Verizon utilized for its VCAST service.¹³²¹ However, with the growth of IP connected smartphones, Verizon Video is now delivered over IP, and the specialized MediaFLO reception hardware is no longer necessary or included in handsets. The MediaFLO network was shut down in late 2010, and Qualcomm sold the spectrum to AT&T. ATSC Mobile/Handheld ("ATSC M/H") receivers have appeared in the market, mostly in the form of USB tuner peripherals that connect to personal computers.¹³²² These USB receivers allow consumers to view ATSC M/H broadcasts on their laptops.¹³²³ Driven by industry groups like the Open Mobile Video Coalition ("OMVC"),¹³²⁴ some smartphone manufacturers have announced plans to include the hardware needed to receive ATSC M/H broadcasts in

¹³¹⁷ See Gartner, Inc., *Gartner Says Apple Will Have a Free Run in Tablet Market Holiday Season as Competitors Continue to Lag* (press release), Sept. 22, 2011.

¹³¹⁸ See Zach Epstein, *NPD: One in Five Smartphones Sold in Q2 Was 4G Capable, HTC Leads Market*, BGR Media, LLC, Oct. 14, 2011, <http://www.bgr.com/2011/10/14/npd-one-in-five-smartphones-sold-in-q2-was-4g-capable-htc-leads-market/> (visited Mar. 8, 2012).

¹³¹⁹ Letter from Michael Powell at 4.

¹³²⁰ *Id.* at 2.

¹³²¹ See Verizon Wireless, *Verizon Wireless Lifts Curtain on VCAST Mobile TV True Broadband Quality, the Best of TV* (press release), Jan. 7, 2007.

¹³²² See WinTV Aero-m product description, Hauppauge Computer Works, Inc., http://www.hauppauge.com/site/products/data_aero-m.html (visited Mar. 2, 2012).

¹³²³ Universal Serial Bus ("USB") is a set of connectivity specifications that allows easy, high-speed connections of peripherals to PCs that, once plugged in, configure automatically. USB is found in over ten billion PCs, consumer electronics, and mobile devices. See USB (Universal Serial Bus), <http://www.intel.com/content/www/us/en/io/universal-serial-bus/universal-serial-bus.html> (visited Mar. 8, 2012).

¹³²⁴ See Open Mobile Video Coalition, <http://www.openmobilevideo.com/> (visited Mar. 6, 2012).

their products beginning in late 2012.¹³²⁵ MetroPCS will offer handsets made by Samsung that include ATSC M/H reception hardware.¹³²⁶ The resulting increase in specialty receiver penetration could allow mobile broadcast video services that rely on ATSC M/H specialty receivers to succeed where the previous attempts have been unsuccessful.

404. In order to compete in the mobile video marketplace by delivering video over their own networks, satellite-based providers face technical challenges such as antenna size, weight, and ability to track satellites while in motion. Because they must be larger than would typically be found in a handheld device, mobile satellite-based devices are more often integrated into passenger vehicles. Several companies have attempted to introduce mobile video services targeted toward family-sized passenger vehicles. CruiseCast, a joint service of AT&T Inc. and RaySat Broadcasting Corp., began service in June 2009, but in November 2009 ceased activating new customers and refunded existing customers for equipment purchased.¹³²⁷ ICO mim (mobile interactive media) launched its North American geosynchronous satellite in 2007. ICO had planned to provide interactive mobile video, navigation, and emergency assistance, but does not appear to have expanded beyond trials begun in 2009.¹³²⁸ SiriusXM's Backseat TV continues to operate, offering three family-oriented channels – Nickelodeon, Disney Channel, and Cartoon Network. Backseat TV can be purchased pre-installed in several vehicle models, with controls integrated into the vehicle's audio head unit.¹³²⁹

VI. PROCEDURAL MATTERS

405. This *14th Report* is issued pursuant to authority contained in sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 403, and 548(g).

406. It is ORDERED that the Office of Legislative Affairs shall send copies of the *14th Report* to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

¹³²⁵ See Joseph Palenchar, *Dyle's Mobile DTV Service to Launch on Smartphone*, TWICE, Jan. 4, 2012, <http://www.twice.com/article.478473-Dyle's+Mobile+DTV+Service+To+Launch+On+Smartphone.php> (visited Mar. 2, 2012).

¹³²⁶ See Electronista, *MetroPCS to Offer Phones with ATSC Mobile TV Tuners. MetroPCS will Launch Samsung Mobile TV Phone*, Jan. 4, 2012, <http://www.electronista.com/articles/12/01/04/metropcs.will.launch.samsung.mobile.tv.phone/> (visited Mar. 9, 2012).

¹³²⁷ Amy Gilroy, *AT&T CruiseCast Ceases Activations*, TWICE, Nov. 2, 2009, <http://www.twice.com/article.367231-AT+T+CruiseCast+Ceases+Activations.php?nid=2102&source=title&rid=6258981> (visited Nov. 10, 2011).

¹³²⁸ See ICO mim website, <http://www.ico.com/mim/> (visited Mar. 8, 2012).

¹³²⁹ See SiriusXM Backseat TV, <http://www.siriusxm.com/backseattv> (visited Mar. 8, 2012).

407. It is FURTHER ORDERED that the proceeding in MB Docket No. 07-269 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters¹2007/2008 Comments (5/20/09 Comments)

American Cable Association ("ACA")
AT&T Inc. ("AT&T")
Cable and Telecommunications Committee of the New Orleans City Council ("New Orleans")
Comcast Corporation ("Comcast")
Community Broadcasters Association ("CBA")
Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio ("Ohio Community Board")
Consumer Union ("Consumers Union")
DIRECTV, Inc. ("DIRECTV")
Heritage Media Services ("Heritage")
Mathew Murphy ("Murphy")
Microcom ("Micro")
Montgomery County, Maryland ("Montgomery County")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
National Telecommunications Cooperative Association ("NTCA")
Reynolds Media Incorporated ("RMI")
Verimatrix, Inc. ("Verimatrix")
Verizon ("Verizon")
W.A.T.C.H. TV Company ("W.A.T.C.H. TV")

2007/2008 Reply Comments (6/20/09 Reply)

AT&T Inc. ("AT&T")
Consumers Union ("Consumers Union")
Cox Communications ("Cox")
DISH Network L.L.C. ("DISH Network")
HDNet LLC ("HDNet")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
Verizon ("Verizon")

¹ The Commission issued three notices of inquiry in this proceeding. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Red 750 (2009) ("Notice of Inquiry"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, 24 FCC Red 4402 (2009) ("Supplemental Notice of Inquiry"); and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Red 14091 (2011) ("Further Notice"). In response to these notices, we received three sets of comments and reply comments. Comments for 2007 and 2008 were due on May 20, 2009 and reply comments were due on June 20, 2009. For 2009, comments were due on July 29, 2009; reply comments were due on August 28, 2009. Additional 2009 and new 2010 comments were due on June 8, 2011 and reply comments for those years were due on July 8, 2011. We refer to each submission by its due date and the acronym as listed in this Appendix.

2009 Comments (7/29/09 Comments)

American Cable Association ("ACA")
AT&T Inc. ("AT&T")
Consumers Union ("Consumers Union")
DIRECTV, Inc. ("DIRECTV")
DISH Network L.L.C. ("DISH Network")
Independent Film & Television Alliance ("IFTA")
Marin Telecommunications Agency, Marin County, California ("Marin")
Montgomery County, Maryland ("Montgomery County")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO")
TiVo Inc. ("TiVo")
Verizon ("Verizon")
W.A.T.C.H. TV Company ("W.A.T.C.H. TV")
WealthTV ("WealthTV")

2009 Reply Comments (8/28/09 Reply)

American Cable Association ("ACA")
Association of Public Television Stations and Public Broadcasting Service ("APTS")
Cablevision Systems Corporation ("Cablevision")
CBS Corporation ("CBS")
Comcast Corporation ("Comcast")
Community Broadcasters Association ("CBA")
Cox Communications ("Cox")
DIRECTV, Inc. ("DIRECTV")
Free Press ("Free Press")
Motion Picture Association of America, Inc. ("MPAA")
National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and the NBC Television Affiliates ("Broadcasters Associations")
National Cable & Telecommunications Association ("NCTA")
NBC Universal, Inc. ("NBCU")
RCN Telecom Services, Inc. ("RCN")
Verizon ("Verizon")
The Walt Disney Company ("Disney")

2009, 2010 Comments (6/8/11 Comments)

Alliance for Community Media ("ACM")
The Allvid Tech Company Alliance ("AllVid Alliance")
American Cable Association ("ACA")
Anne Arundel and Montgomery Counties, Maryland, and the Cities of Boston, Massachusetts, and Laredo, Texas ("Anne Arundel")
AT&T Inc. ("AT&T")
California Public Utilities Commission and the People of the State of California ("California PUC")
City & County of Denver, Colorado ("Denver")

City of South Portland, Maine ("South Portland")
Comcast Corporation ("Comcast")
Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio ("Ohio Community Board")
Consumer Electronics Association and Consumer Electronics Retailers Coalition ("CEA")
Digital Broadcasting OVS ("Digital Broadcasting")
DIRECTV, Inc. ("DIRECTV")
DISH Network L.L.C. ("DISH Network")
Google Inc. ("Google")
Hiawatha Broadband Corporation Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance, and Rural Independent Competitive Alliance ("Rural Telcos")
Marin Telecommunications Agency, Marin County, California ("Marin")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
National Telecommunications Cooperative Association; the Independent Telephone and Telecommunications Alliance; the Organization for the Promotion and Advancement of Small Telecommunications Companies; the Rural Independent Competitive Alliance; and the Western Telecommunications Alliance ("Rural Associations")
Netflix, Inc. ("Netflix")
New Jersey Division of Rate Counsel ("New Jersey")
Oxnard College Television ("Oxnard College")
Oxnard Elementary School District, Oxnard California ("Oxnard Elementary")
Public Knowledge ("Public Knowledge")
Rovi Corporation ("Rovi")
Susan Udovic ("Udovic")
Verizon ("Verizon")
Writers Guild of America, West, Inc. ("WGAW")

2009/2010 Reply Comments (7/8/11 Reply)

The Allvid Tech Company Alliance ("AllVid Alliance")
AT&T Inc. ("AT&T")
Cable and Telecommunications Committee of the New Orleans City Council ("New Orleans")
Cisco Systems, Inc. ("Cisco")
City of New York ("NYC")
Comcast Corporation ("Comcast")
DIRECTV, Inc. ("DIRECTV")
Montgomery County, Maryland ("Montgomery County")
Motorola Mobility, Inc. ("Motorola")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
New Jersey Division of Rate Counsel ("New Jersey")
SureWest Communications ("SureWest")

APPENDIX B

National Video Programming Services

Table B-1

National Video Programming Services Affiliated with One or More MVPDs

Network Owner	Networks Wholly Owned or Owned in Part
Bright House Networks	Animal Planet, Animal Planet HD, Discovery Channel, Discovery Channel HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, HD Theater, Investigation Discovery, Investigation Discovery HD, Military Channel, OWN, OWN HD, Planet Green, Planet Green HD, Science Channel, Science Channel HD, The HUB, The HUB HD, TLC, TLC HD Turbo, Velocity HD, 3net
Cablevision ⁽¹⁾ (AMC Networks Inc.)	AMC, AMC HD, FUSE, FUSE HD, IFC, IFC HD, Sundance Channel, WE, WE HD
Comcast/NBCU	A&E, A&E HD, Bio, Bio HD, Bravo, Bravo HD, Chiller, Chiller HD, Cloo, CNBC, CNBC HD, CNBC World, CNBC World HD, Crime & Investigation, Crime & Investigation HD, E! Entertainment TV, E! Entertainment TV HD, EPIX, EPIX HD, FEARnet, FEARnet HD, G4, G4 HD, Golf Channel, Golf Channel HD, History Channel, History Channel HD, History Channel en Espanol, H2, H2 HD, iN Demand, iN Demand HD, ION Life, ION TV, ION TV HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military History Channel, MLB Network, MLB Network HD, The Mtn, The Mtn HD, MSNBC, MSNBC HD, mun2, Music Choice, NBC Sports Network, NBC Sports Network HD, NHL Network, NHL Network HD, Oxygen Network, Oxygen Network HD, PBS Kids Sprout, qubo, Retirement Living TV, ShopNBC, Sleuth, SYFY, SYFY HD, Telemundo, TV One, TV One HD, Style Network, Style Network HD, The Weather Channel, The Weather Channel HD, Weatherscan, Universal HD, USA Network, USA Network HD
Cox Enterprises	iN Demand, iN Demand HD, MLB Network, MLB Network HD Travel Channel, Travel Channel HD
DIRECTV	Game Show Network, GSN HD, MLB Network, MLB Network HD
Liberty Media Corporation ⁽²⁾	Animal Planet, Animal Planet HD, Discovery, Discovery HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, Encore, Encore HD, Encore Action, Encore Action HD, Encore Drama, Encore Drama HD, Encore Love, Encore Mystery, Encore WAM, Encore Westerns, Game Show Network, GSN HD, GAC, HDTheater, HSN, HSN HD, HSN2, Investigation Discovery, Military Channel, MoviePlex, OWN, OWN HD, Planet Green, Planet Green HD, Movie Plex, QVC, QVC HD, Starz, Starz HD, Starz Cinema, Starz Cinema HD, Starz Comedy, Starz Comedy HD, Starz Edge, Starz Edge HD, Starz in Black, Starz in Black HD, Starz Kids and Family, Starz Kids and Family HD Science Channel, Science Channel HD, TLC, TLC HD, The Hub, The HUB HD, 3net

Network Owner	Networks Wholly Owned or Owned in Part
Time Warner Cable	Exercise TV, GameHD, Game2HD, HDPPV, iN Demand, iN Demand HD, MLB Network, MLB Network HD, MLS Direct Kick, NBA League Pass, NHL Center Ice, Team HD

Notes:

⁽¹⁾ On December 31, 2010, Cablevision System Corporation ("Cablevision") wholly owned programming subsidiary Rainbow Media Holding LLC ("Rainbow") transferred control of the News 12 regional programming services to Cablevision. On June 30, 2011, Cablevision spun-off Rainbow, which became an independent public company, now called AMC Networks Inc. We list these networks as affiliated with this media company since AMC and Cablevision share common ownership, officers, and directors.

⁽²⁾ On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation ("Liberty") acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty through a series of transactions transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc. We list these networks as affiliated with this media company since Liberty and DIRECTV share common ownership, officers, and directors.

Sources:

Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority To Transfer Control. Consolidated application For Authority to Transfer Control, Jan. 29, 2007, at 10-11.

AMC Networks Inc., *SEC Form-Q*, for the Quarterly Period Ending September 30, 2010 ("AMC 10-Q"), at 7.

Bright House Networks, *About Us*, at <http://brighthouse.com/corporate/default> (visited Feb. 8, 2012).

Cablevision, *About Cablevision*, at <http://www.cablevision.com/about/index.jsp> (visited Feb. 8, 2012).

Comcast-NBCU Order, 26 FCC Red at 4410-18, Appendix D: *GE Comcast-NBCU Application* at 19-20, 30-31.

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources/> (visited Feb. 8, 2012).

Cox Enterprises, *Corporate Overview*, at <http://www.coxenterprises.com/about-cox/corporate-overview.aspx> (visited Feb. 8, 2012).

DIRECTV, *About Us*, at http://www.directv.com/DIVAPP/content/about_us/our_company (visited Feb. 8, 2012).

Liberty Media Corporation, *SEC Form 10-K*, for the Fiscal Year Ending December 31, 2010 ("Liberty 2010 Form 10-K") at 1-26.

Liberty Media Corporation, *Company Overview*, at <http://www.libertymedia.com/company-overview.aspx> (visited Feb. 8, 2012).

NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Cable Inc. *TWC Insight Application* at Exhibit F.

Time Warner Cable Inc. *SEC Form 10-K*, for the Period Ending December 31, 2009 (“TWC 2010 Form 10-K”) at 5.

Time Warner Cable Inc. *About Us*, at <http://www.timewarnercable.com/nynj/about/> (visited Feb. 8, 2012).

Table B-2

National Networks Affiliated with a Television Network, Broadcast Television Licensee, or Other Media Company

Network Owners:	Networks Wholly Owned or Owned in Part
CBS Corporation	CBS Sports Network, CBS Sports Network HD, College Sports Television, College Sports Television HD, FLIX, FLIX HD, MountainWest Sports Network, MountainWest Sports Network HD, Showtime, Showtime HD, Showtime Beyond, Showtime Beyond HD, Showtime Extreme, Showtime Extreme HD, Showtime Family Zone, Showtime Family Zone HD, Showtime Next, Showtime Next HD, Showtime Showcase, Showtime Showcase HD, Showtime 2, Showtime 2 HD, Showtime Women, Showtime Women HD, Smithsonian Channel HD, TMC, TMC HD, TMC Xtra, TMC Xtra HD
Crown Media Holdings	Hallmark Channel, Hallmark Channel HD, Hallmark Movie Channel, Hallmark Movie Channel HD
Daystar Television Network	Daystar TV
Discovery Communications ⁽¹⁾	3net A&E, A&E HD, Animal Planet, Animal Planet HD, Discovery, Discovery HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, HD Theater, Investigation Discovery, Military Channel, OWN, Planet Green, Planet Green HD, Science Channel, Science Channel HD, TLC, TLC HD, The Hub, Velocity HD
Hearst Corporation	A&E, A&E HD, Bio, Bio HD, Crime & Investigation, Crime & Investigation HD, ESPN 3D, ESPN Classic, ESPN Deportes, ESPN, ESPN HD, ESPN2, ESPN2 HD, ESPNEWS, ESPNEWS HD, ESPNU, ESPNU HD, H2, History, History HD, History en Espanol, History International, Lifetime, Lifetime HD, Lifetime Real Women, Lifetime Real Women HD, LMN, LMN HD, Military History Channel
Hubbard Broadcasting Corporation	Reelz Channel, Reelz Channel HD, Ovation TV, Ovation TV HD
InterMedia Partners	Gospel Music Channel, Gospel Music Channel HD, The Sportsman Channel, The Sportsman Channel HD, WAPA-America
News Corporation	Big Ten Network, BTN HD, FOX Business Network, FOX Business Network HD, FOX College Sports, FOX College Sports HD, FOX Deportes, FOX Movie Channel, FOX News Channel, FOX News Channel HD, FOX Soccer Channel, FOX Soccer Channel HD, FOX Soccer Plus, FOX Sports Net, FOX Sports Net HD, FUEL TV, FUEL TV HD, FX Network, FX Network HD, Nat Geo WILD, Nat Geo WILD HD, National Geographic Channel, National Geographic Channel HD, SPEED Channel, SPEED HD, TV Guide Network
Scripps Networks Interactive ⁽²⁾	Cooking Channel, Cooking Channel HD, DIY Network, DIY Network HD, Food Network, Food Network HD, Great American Country, HGTV, HGTV HD, Travel Channel, Travel Channel HD

Network Owners:	Networks Wholly Owned or Owned in Part
The Walt Disney Company	A&E, A&E HD, ABC Family, ABC Family HD, Bio, Bio HD, Crime & Investigation Network, Crime & Investigation HD, Disney Channel, Disney Channel HD, Disney XD, Disney XD HD, ESPN 3D HD, ESPN Classic, ESPN Classic HD, ESPN Deportes, ESPN, ESPN HD, ESPN2, ESPN2 HD, ESPNNews, ESPNNews HD, ESPNU, ESPNU HD, H2, History Channel, History Channel HD, History International, History International HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military History Channel, SOAPnet
Time Warner Inc. ⁽¹⁾	@Max, @Max HD, 5 Star Max, 5 Star Max HD, Action Max, Action Max HD, Boomerang, Cartoon Network/Adult Swim, Adult Swim HD, Cinemax, Cinemax HD, CNN, CNN HD, CNN Airport, CNN Headline News, CNN International, HBO, HBO HD, HBO2, HBO2HD, HBO Comedy, HBO Comedy HD, HBO Family, HBO Family HD, HBO Signature, HBO Signature HD, HBO Zone, HBO Zone HD, More Max, More Max HD, NBA, NBA HD, Outer Max, Outer Max HD, TBS, TBS HD, TMC, TMC HD, Thriller Max, Thriller Max HD, TNT, TNT HD, Tru TV, Tru TV HD, WMAX WMAX HD
Tribune Company	WGN America, WGN America HD, Food Network, Food Network HD
Viacom Inc.	BET, BET HD, BET Gospel, BET Hip Hop, CENTIC, CMT, CMT HD, CMT Pure Country, CMT Pure Country HD, Comedy Central, Comedy Central HD, EPIX, EPIX HD, LOGO, MTV, MTV HD, MTV Hits, MTV Jams, MTV2, Nick 2, Nickelodeon/Nick at Nite, Nickelodeon/Nick at Nite HD, HD Nicktoons Network, Palladia HD, Spike TV, Spike TV HD, TeenNick, EPIX HD, Tr3s, TV Land, VH1, VH1 HD, VH1 Classic, VH1 Soul
Trinity Broadcasting Network	JCTV, Smile of a Child, TBN, TBN HD, TBN Enclave, The Church Channel
Univision Communications	Bandamax, De Pelicula, De Pelicula Classico Ritmoson Latino, Galavision, Telchit, TeleFutura, TeleFutura HD

Notes:

⁽¹⁾ On September 17, 2008, Discovery Holding Company ("DHC") an independent publicly traded company was formed. We list these networks as affiliated because Liberty Media and Advance/Newhouse, owner of cable system Bright House Networks, share common ownership, officers, and directors with DHC.

⁽²⁾ On July 1, 2008, E.W. Scripps spun-off its programming into an independent publicly traded company, Scripps Interactive Networks ("SNI"). We list these networks as affiliated since SNI and E.W. Scripps share common ownership, officers, and directors.

⁽³⁾ On February 11, 2008, the Commission approved the applications for the assignment and transfer of control of certain Commission licenses and authorizations that resulted in Time Warner Cable, Inc. ("TWC") separating from Time Warner Inc. In March 2009, TWC completed its separation from Time Warner Inc.

Sources:

CBS Corporation, *About CBS*, at <http://www.cbcorporation.com/index.php> (visited Feb. 8, 2012).

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources> (visited Feb. 8, 2012).

Crown Media Holdings, *Company Overview*, at <http://ir.crownmedia.net/index.cfm> (visited Feb. 8, 2012).

Discovery Communications, Inc., *SEC Form 10-K*, for the Fiscal Year Ending December 31, 2010 (“Discovery 10-K”), at 3.

Discovery Communications, *Our Company*, at <http://corporate.discovery.com/our-company/overview> (visited Feb. 8, 2012).

E.W. Scripps Networks Interactive, *SEC Form 10-K* for the Fiscal Year Ending December 31, 2010 (“E.W. Scripps 10-K”) at 4.

Hearst Corporation, *About Hearst*, at <http://www.hearst.com/broadcasting/index.php> (visited Feb. 8, 2012).

NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

News Corporation, *Cable Network Programming*, at <http://www.newscorp.com/operations/cable.html> (visited Feb. 8, 2012).

Scripps Networks Interactive, *About Us*, at <http://www.scrippsnetworks.com/about.aspx?code=about> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Inc., *About Us*, at <http://www.timewarner.com/our-company/about-us/> (visited Feb. 8, 2012).

Trinity Broadcasting Network, *About Us*, at http://www.tbn.org/about/images/TBN_Networks_info.pdf (visited Feb. 22, 2012).

Univision, *Company Overview*, at <http://univision.com/> (visited Feb. 8, 2012).

Viacom Inc., *About Viacom*, at <http://www.viacom.com/aboutviacom/Pages/default.aspx> (visited Feb. 8, 2012).

Walt Disney Corporation, *Company Overview*, at <http://corporate.disney.go.com/corporate/overview.html> (visited Feb. 8, 2012).

APPENDIX C

Regional Video Programming Services

Table C-1

Regional Video Programming Services Affiliated with One or More MVPDs

Network Owners	Networks Wholly or Owned in Part
Bright House Networks	Regional News Networks: Bay News 9, Bay News 9 HD, Bay News 9 en Espanol, CFN 13 (Central FL News) Regional Sports Networks: Bright House Sports Network, Bright House Sports Network HD
Cablevision Systems Corporation ⁽¹⁾ (Madison Square Garden) ⁽²⁾	Regional News Networks: News 12 CT, News 12 Bronx, News 12 Brooklyn, News 12 Hudson Valley, News 12 Long Island, News 12 NJ, News 12 Traffic & Weather – CT, News 12 Traffic & Weather – Long Island, News 12 Traffic & Weather – Hudson Valley, News 12 Traffic & Weather – NJ, News 12 Traffic & Weather – NY, News 12 Westchester Regional Sports Networks: MSG, MSG HD, MSG Plus, MSG Plus HD
Charter Communications	Regional Sports Networks: Comcast/Charter SportsNet Southeast
Comcast/NBCU	Regional News Networks: CN8, New England Cable News New England Cable News HD Regional Sports Networks: Comcast Entertainment TV (CET), Comcast SportsNet Bay Area, Comcast SportsNet California, Comcast SportsNet Chicago, Comcast SportsNet Chicago HD, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Mid-Atlantic HD, Comcast SportsNet New England Comcast SportsNet New England HD, Comcast SportsNet Philadelphia Comcast SportsNet Philadelphia HD, Comcast SportsNet Northwest, Comcast SportsNet Northwest HD, Comcast SportsNet Washington, Comcast SportsNet Washington HD, Comcast SportsNet West, Comcast SportsNet West HD, Comcast SportsNet Southwest, SportsNet New York, SportsNet New York HD
Cox Enterprises	Regional News Networks: 24/7 News Channel, Arizona News Channel, Kansas 22 Now, Las Vegas One News Local News on Cable (Hampton), News Now 53 (Oklahoma City), News Now 53 (Tulsa), NewsWatch 15 (Louisiana), Pittsburgh Cable News Channel, Rhode Island News Channel, San Diego's News Channel 15 Regional Sports Networks: Channel 4 San Diego, Cox Sports Television
DIRECTV	Regional Sports Networks: Roots Sports Northwest Roots Sports Northwest HD, Roots Sports Pittsburgh, Roots Sports Pittsburgh HD, Roots Sports Rocky Mountain, Roots Sports Rocky Mountain HD

Network Owners	Networks Wholly or Owned in Part
Time Warner Cable	<p>Regional News Networks: Antelope Valley Channel 3 (Southern CA), Bay News 9, Bay News 9 HD, BEVOD (TX), Capital News 9 (Albany, NY), Channel 858 (Southern CA), Desert Cities TV (Southern CA), The Green Channel (HI), K-Life(HI), Metro Weather (Kansas City), NEON (OH), News 8 Austin (TX), News 8 Radar Now (TX), News 8 Traffic Now (TX), News 8 Non-Stop Weather (TX), News 10 Now (TX), News 14 Carolina (Charlotte, NC), News 14 Carolina (Raleigh, NC), News 14 Carolina (Greensboro, NC), News 14 Carolina (Wilmington, Jacksonville, Morehead city, NC), Nippon Golden Network (HI), NY1 News (NY), NY1 Road and Rail Report (NY), OC 16 (HI), Oivi (HI), Rhode Island News Channel, SoCal 11 (Southern CA), Texas Channel (Austin, Waco, San Antonio, Corpus Christi, TX), Texas Chanel (Dallas), Texas Channel (El Paso), TWC-TV (New England), YNN (Austin, TX), YNN Austin, YNN Austin Radar Now, YNN Austin Traffic Now, YNN Austin Weather, YNN Buffalo (NY), YNN Capital Region (Albany, NY), YNN Central NY, YNN Hudson Valley (NY), YNN Rochester (NY), Wichita Falls TV (TX)</p> <p>Regional Sports Networks: Bright House Sports Network, Bright House Sports Network HD, Comcast/Charter SportsNet Southwest Metro Sports (Kansas City), Metro Sports HD, Metro Sports (NE), Metro sports (NE) HD, Metro Sports 2 (Kansas City, MO), News 8 Non-Stop Sports (TX), SportsNet New York, SportsNet New York HD, SunSports, SunSports HD, TWC Connection:Sports (Mid-Ohio), TWC Connections:Sports (Southwest Ohio), TWC Sports (Albany, NY), TWC sports (Albany) HD, TWC Sports Central New York, TWC Sports (WI), TWC SportsNet (Buffalo), TWC Sports (Rochester), YNN Non-Stop Sports</p>

Notes:

⁽¹⁾ On December 31, 2010, Cablevision System Corporation ("Cablevision") wholly owned programming subsidiary Rainbow Media Holding LLC ("Rainbow") transferred control of the News 12 regional programming services to Cablevision. On June 30, 2011, Cablevision spun-off Rainbow, which became an independent public company, now called AMC Networks Inc. We list these networks as affiliated with this media company since AMC and Cablevision share common ownership, officers, and directors.

⁽²⁾ On July 29, 2009, Madison Square Garden, Inc. ("MSG") was incorporated as an indirect, wholly-owned subsidiary of Cablevision Systems Corporation. On February 9, 2010, MSG was spun off from Cablevision, becoming a separate public company. We list these networks as affiliated since MSG and Cablevision share common ownership, officers, and directors.

Sources:

AMC Networks Inc., *SEC Form 10-Q*, Quarterly Period Ending September 30, 2011 ("AMC 10-Q") at 7.

Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority To Transfer Control, Consolidated application For Authority to Transfer Control, Jan. 29, 2007, at 10-11.

Cablevision, *About Cablevision*, at <http://www.cablevision.com/about/index.jsp> (visited Feb. 8, 2012).

Charter Communications, *About Charter*, at <http://www.charter.com/footer/footerPage.jsp?tag=about> (visited Feb. 8, 2012).

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources/> (visited Feb. 8, 2012).

Comcast-NBCU Order, 26 FCC Red at 4410-18, Appendix D: *GE Comcast-NBCU Application* at 19-20, 30-31.

Cox Enterprises, *Corporate Overview*, at <http://www.coxenterprises.com/about-cox/corporate-overview.aspx> (visited Feb. 8, 2012).

Madison Square Garden, Inc., *SEC Form 10-K*, for the Fiscal Year ending December 31, 2010 (“MSG” 10-K) at 3.

NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Cable *About Us*, at <http://www.timewarnercable.com/nynj/about/> (visited Feb. 8, 2012).

Table C-2

Regional Networks Affiliated with a National Broadcast Television Network, Broadcast Television Licensee, or Other Media Company

Network Owners	Networks Wholly or Owned in Part
Allbritton Communications	Regional News Networks: NewsChannel 8, NewsChannel 8 HD
Belo Corporation	Regional News Networks: 24/7 News Channel (Boise, ID), Arizona News Channel, Local News on Cable (Hampton), NewsWatch 15 (Louisiana), Northwest Cable News (Washington, Oregon, Idaho), TXCN (Texas)
CBS Corporation	Regional Sports Networks: MountainWest Sports Network, The Mtn. HD
News Corporation	Regional Sports Networks: FOX Sports Arizona, FOX Sports Arizona HD, FOX Sports Carolinas, FOX Sports Carolinas HD, FOX Sports Detroit, , FOX Sports Detroit HD, FOX Sports Florida, FOX Sports Florida HD, FOX Sports Houston, FOX Sports Houston HD, FOX Sports Indiana, FOX Sports Indiana HD, FOX Sports Kansas City, FOX Sports Kansas City HD, FOX Sports Midwest, FOX Sports Midwest HD, FOX Sports North, FOX Sports North HD, FOX Sports Ohio, FOX Sports Ohio, HD, FOX Sports Oklahoma, FOX Sports Oklahoma HD, FOX Sports South, FOX Sports South HD, FOX Sports Southwest, FOX Sports Southwest HD, FOX Sports Tennessee, FOX Sports Tennessee HD, FOX Sports West, FOX Sports West HD, FOX Sports Wisconsin, FOX Sports Wisconsin HD, Sun Sports, Sun Sports HD
Scripps Networks Interactive	Regional Sports Networks: FOX Sports South , FOX Sports South HD

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APPENDIX D

Regional Sports Networks

Regional Network Name ⁽¹⁾	MVPD Owner	Other Owners
Altitude Sports Network		Stan Kroenke (owner of the Denver Nuggets and the Colorado Avalanche)
Altitude Sports Network HD		Stan Kroenke (owner of the Denver Nuggets and the Colorado Avalanche)
Bright House Sports Network	Time Warner Cable	
Bright House Sports Network HD	Time Warner Cable	
Big Ten Network		Big Ten Conference, News Corporation
Big Ten Network HD		Big Ten Conference, News Corporation
Channel 4 San Diego ⁽²⁾	Cox Enterprises	
Channel 4 San Diego HD	Cox Enterprises	
Comcast/Charter Sports Southeast	Comcast, Charter	
Comcast/Charter Sports Southeast HD	Comcast, Charter	
Comcast SportsNet Bay Area	Comcast/NBCU	San Francisco Giants
Comcast SportsNet Bay Area HD	Comcast/NBCU	San Francisco Giants
Comcast Sports Net California	Comcast/NBCU	
Comcast SportsNet California HD	Comcast/NBCU	
Comcast SportsNet Chicago	Comcast/NBCU	J. Joseph Ricketts (owner of the Cubs), Jerry Reinsdorf (owner of the Bulls and the White Sox), Rocky Wirtz (owner of the Blackhawks)
Comcast SportsNet Chicago HD	Comcast/NBCU	J. Joseph Ricketts (owner of the Cubs), Jerry Reinsdorf (owner of the Bulls and the White Sox), Rocky Wirtz (owner of the Blackhawks)
Comcast SportsNet Houston ⁽³⁾	Comcast/NBCU	Houston Astros, Houston Rockets
Comcast SportsNet Houston HD	Comcast/NBCU	Houston Astros, Houston Rockets

Regional Network Name ⁽¹⁾	MVPD Owner	Other Owners
Comcast SportsNet New England	Comcast NBCU	
Comcast SportsNet New England HD	Comcast NBCU	
Comcast SportsNet Northwest	Comcast NBCU	
Comcast SportsNet Northwest HD	Comcast NBCU	
Comcast SportsNet Philadelphia	Comcast NBCU	Philadelphia Phillies
Comcast SportsNet Philadelphia HD	Comcast NBCU	Philadelphia Phillies
Comcast SportsNet Washington	Comcast NBCU	
Comcast SportsNet Washington HD	Comcast NBCU	
Comcast Sports Southwest	Comcast NBCU	
Comcast Sports Southwest HD	Comcast NBCU	
Cox Sports Television (New Orleans)	Cox Enterprises	
Cox Sports Television HD (New Orleans)	Cox Enterprises	
Fox Sports Arizona		News Corporation
Fox Sports Arizona HD		News Corporation
Fox Sports Carolinas		News Corporation
Fox Sports Carolinas HD		News Corporation
Fox Sports Detroit		News Corporation
Fox Sports Detroit HD		News Corporation
Fox Sports Florida		News Corporation
Fox Sports Florida HD		News Corporation
Fox Sports Midwest		News Corporation
Fox Sports Midwest HD		News Corporation
Fox Sports North		News Corporation
Fox Sports North HD		News Corporation
Fox Sports Ohio		News Corporation
Fox Sports Ohio HD		News Corporation
Fox Sports Prime Ticket		News Corporation
Fox Sports Prime Ticket HD		News Corporation
Fox Sports South		News Corporation
Fox Sports South HD		News Corporation
Fox Sports Southwest		News Corporation

Regional Network Name⁽¹⁾	MVPD Owner	Other Owners
Fox Sports Southwest HD		News Corporation
Fox Sports Tennessee		News Corporation
Fox Sports Tennessee HD		News Corporation
Fox Sports West		News Corporation
Fox Sports West HD		News Corporation
Fox Sports Wisconsin		News Corporation
Fox Sports Wisconsin HD		News Corporation
Lakers RSN ⁽⁴⁾	Time Warner Cable	
Lakers RSN HD	Time Warner Cable	
Lakers RSN (Spanish language)	Time Warner Cable	
Lakers RSN HD (Spanish language)	Time Warner Cable	
Longhorn Network		University of Texas at Austin, Walt Disney
Longhorn Network HD		University of Texas at Austin, Walt Disney
MASN		Baltimore Orioles and the Washington Nationals
MASN HD		Baltimore Orioles and the Washington Nationals
Metro Sports (Kansas City)	Time Warner Cable	
Metro Sports HD (Kansas City)	Time Warner Cable	
Metro Sports (Nebraska)	Time Warner Cable	
MSG	Cablevision	
MSG HD	Cablevision	
MSG Plus	Cablevision	
MSG Plus HD	Cablevision	
NESN		Boston Red Sox and Boston Bruins
NESN HD		Boston Red Sox and Boston Bruins
OC Sports (Hawaii)	Time Warner Cable	
OC Sports HD (Hawaii)	Time Warner Cable	
PAC-12 Network		PAC-12 Conference
PAC-12 Network HD		PAC-12 Conference
SportsNet New York	Comcast, TWC	
SportsNet New York HD	Comcast, TWC	

Regional Network Name ⁽¹⁾	MVPD Owner	Other Owners
The Mtn. – Mountain West Sports Network ⁽⁵⁾	Comcast	CBS
The Mtn. – Mountain West Sports Network HD	Comcast	CBS
TWC Sports (Central NY)	Time Warner Cable	
TWC Sports HD (Central NY)	Time Warner Cable	
TWC SportsNet (Buffalo)	Time Warner Cable	
TWC SportsNet HD (Buffalo)	Time Warner Cable	
TWC SportsNet (Rochester)	Time Warner Cable	
TWC SportsNet HD (Rochester)	Time Warner Cable	
TWC Connection/Sports (Mid-Ohio)	Time Warner Cable	
TWC Connection/Sports (SW Ohio)	Time Warner Cable	
TWC Sports 32 (Wisconsin)	Time Warner Cable	
TWC Sports 32 HD (Wisconsin)	Time Warner Cable	
Texas Channel (Texas)	Time Warner Cable	
YNN Non-Stop Sports (Texas)	Time Warner Cable	

Notes:

⁽¹⁾ See SNL Kagan, *Media Trends* (2011 Edition), at 70-74. This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an "RSN" as defined by the Commission.

⁽²⁾ While press reports indicate that Channel 4 San Diego will no longer hold the rights for the Major League Baseball games of the San Diego Padres in 2012, these reports also indicate that Channel 4 San Diego carries NCAA Division I basketball games. See *Cox to Layoff Baseball Programming Employees*, Aug. 30, 2011, available at http://www.10news.com/news/29032885_detail.html; *SDSL: Men's Hoops at Arizona to be Simulcast on 4SD*, Nov. 22, 2011, available at <http://goaztees.esv.com/sports-m-baseball/spec-rel/112211aab.html>.

⁽³⁾ Comcast SportsNet Houston is scheduled to launch in 2012, featuring the games of the Houston Astros (of MLB) and the Houston Rockets (of the NBA). See *Go Back to the Future When the Astros and Rockets Launch Their Channel. It Likely Will Remind Viewers of HSE* (Nov. 8, 2010), available at <http://www.chron.com/sports/rockets/article/Astros-Rockets-network-likely-to-resemble-old-1705389.php>

⁽⁴⁾ TWC recently announced that it will launch two RSNs in 2012 featuring the games of the Los Angeles Lakers (of the NBA), including the first Spanish-language RSN. See *Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011), available at <http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight>.

⁽⁵⁾ The Mtn. plans to cease operation on May 31, 2012. See Frank Schwab, *Mountain West TV Network Will Be Discontinued*, THE GAZETTE, Colorado Springs, <http://www.gazette.com/common/printer/view.php?db=colgazette&id=136348> (visited Apr. 27, 2012).

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**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269

First, I thank the incredibly hardworking and talented professionals in the Media Bureau for laboring for what must have been an uncountable number of hours to produce this comprehensive report. The report contains a wealth of information about the video market revealing just how dynamic and constructively chaotic it is. Accordingly, I would have preferred for this report to affirmatively conclude that the video programming market is competitive. It provides ample evidence for such a conclusion.

For example, since our last report, which analyzed data available as of June 2006, "telephone" MVPDs have emerged as a major competitive force, the digital television transition has yielded more channels for free over-the-air, and the Internet and mobile platforms have enabled consumers to access video content from an immeasurable universe of sources. In fact, given these non-traditional players, the competition is even more robust than this report reflects.

More consumers are accessing more online video content, more often. From May 2011 to May 2012, unique viewers of online video content increased by more than four million.¹ The consumption per viewer during the same period increased from 15.9 to 21.9 hours per month, a staggering thirty-eight percent increase.² The amount of content viewed has witnessed growth as well with the number of videos watched increasing by almost three billion, more than seven percent, from May 2010 to May 2012.³

Furthermore, the growth of the Internet video marketplace is underscored by the popularity of over-the-top devices,⁴ which allow consumers to use their televisions and mobile devices to watch online

¹ Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2011 U.S. Online Video Rankings (June 17, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/6/comScore_Releases_May_2011_U.S._Online_Video_Rankings.

² Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2011 U.S. Online Video Rankings (June 17, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/6/comScore_Releases_May_2011_U.S._Online_Video_Rankings.

³ Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2010 U.S. Online Video Rankings (June 24, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Releases_May_2010_U.S._Online_Video_Rankings.

⁴ Over-the-top devices allow content to be sent to a device using a broadband connection. Over-the-top technologies include such products as Internet-enabled televisions, media tablets, gaming consoles, digital media adapters, and Blu-ray players and recorders. See Jordan Selburn, *Over-the-Top Market Emerges from the Shadows*, 1SUPPLI, (continued....)

video content. Industry analysts project shipments of over-the-top devices to increase by nearly fifty percent in 2012, from 258 million to 384.8 million worldwide.⁵ This increase comes on the heels of a sixty-eight percent increase in 2011.⁶ One over-the-top video provider alone exemplifies the growth of this market, recently crossing the threshold of one billion hours viewed in one month.⁷ The company estimates that its twenty-four million U.S. subscribers watched an average of eighty minutes of its content everyday in June.⁸

Unfortunately, the report's analysis of the Internet's effect on the video market is generally limited to online video distributors offering professional content previously exhibited on television or theatrically. Although such content is clearly a driving force in the video market, the Internet, coupled with mobile devices, provides alternate outlets for content outside of the traditional media and entertainment structure. I hope that future reports will also explore the market effects of alternative and emerging online video distributors that are creating new and original content.

I am pleased to vote in support of this report, along with the accompanying notice of inquiry to obtain data regarding the video services industry for 2011 and 2012. We have a terrific opportunity to get the Commission back on track so that we can release these reports *annually* as intended by Congress.

(Continued from previous page) _____
(Mar. 27, 2012). <http://www.isuppli.com/Home-and-Consumer-Electronics/MarketWatch/Pages/Over-the-Top-Market-Emerges-from-the-Shadows.aspx>.

⁵ *Id.*

⁶ *Id.*

⁷ Janko Roettgers, *Netflix Just Became Cable's Biggest TV Network*, NEW TEE VEE, (JUL. 3, 2012, 10:43 AM), <http://gigaom.com/video/netflix-june-one-billion-hours/>.

⁸ *Id.*

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269

I would like to thank the Media Bureau staff for all of their work producing this comprehensive report, which demonstrates in detail that the video marketplace is more competitive than it ever has been. Over the four years covered by the report, the range of MVPD options expanded, broadcasters increased their number of multicast streams, distribution of video content over the Internet exploded, and the variety of devices capable of displaying video programming grew dramatically. This is all good news, because competition within and among market segments (broadcasters, MVPDs, and online video distributors) benefits consumers.

Given the fast pace of change within the industry, it is vital that the Commission comply with its statutory mandate to "annually report to Congress on the status of competition in the market for the delivery of video programming." 47 U.S.C. § 548(g). Our record on this score is a matter of public record and need not be repeated here. I am hopeful, however, that we are back on track and that we will release our next report in 2013.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund	)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
)	
Lifeline and Link-Up	)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

FOURTH ORDER ON RECONSIDERATION

Adopted: July 18, 2012

Released: July 18, 2012

By the Commission:

1. In this Order, we reconsider and clarify certain aspects of the *USF/ICC Transformation Order* in response to various petitions for reconsideration and/or clarification.¹ The *USF/ICC Transformation Order* represents a careful balancing of policy goals, equities, and budgetary constraints. This balance was required in order to advance the fundamental goals of universal service and intercarrier compensation reform within a defined budget while simultaneously providing sufficient transitions for stakeholders to adapt.² As a preliminary matter, we observe that, under Commission rules, if a petition for reconsideration simply repeats arguments that were previously considered and rejected in the proceeding, it will not likely warrant reconsideration.³

¹ See *Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Red 17663 (2011) (“*USF/ICC Transformation Order*” or “*Order*”); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); *Connect America Fund*, WC Docket No. 10-90 et al., Order on Reconsideration, 26 FCC Red 17633 (2011); *Connect America Fund*, WC Docket No. 10-90 et al., Second Order on Reconsideration, FCC 12-47 (rel. April 25, 2012) (“*Second Reconsideration Order*”); *Connect America Fund*, WC Docket No. 10-90 et al., Third Order on Reconsideration, FCC 12-52 (rel. May 14, 2012) (“*Third Reconsideration Order*”).

² See 47 C.F.R. § 1.429.

³ See *id.*

2. With this standard in mind, we take several limited actions stemming from reconsideration petitions. Specifically, this Order:

- Affirms the Commission's adoption of a reverse auction mechanism.
- Denies requests to link funding from Mobility Fund Phase I and Phase II and to condition the use of funds by precluding the use of Mobility Fund Phase I funding for the construction of middle mile facilities in certain cases.
- Denies requests seeking changes to the eligibility requirements for Mobility Fund Phase, including proposals to:
 - Restrict or prohibit Tier I carriers from receiving Mobility Fund Phase I support.
 - Hold applications for eligible telecommunications carrier (ETC) status in abeyance pending completion of the auction and then automatically qualify any winning bidder as an ETC.
 - Deem an entity designated solely as a Lifeline-only ETC to be eligible to participate in the Mobility Fund without first obtaining general ETC status.
 - Clarify that unlicensed spectrum may be used to meet the spectrum access requirements for Mobility Fund Phase I.
- Rejects, for purposes of the auction of Mobility Fund Phase I support, arguments that the Commission provide for bidding preferences to small or rural entities and extend eligibility for the Tribal lands bidding credit to entities that are not Tribally-owned or controlled.
- Declines to adopt a series of performance requirements concerning the upgradability of systems, roaming requirements and rates, and exclusive handset arrangements and to use this proceeding to amend the service rules for Advanced Wireless Service in the 2155-2175 MHz band.

I. MOBILITY FUND PHASE I

A. Use of Auction to Determine Awards of Support

3. The Blooston Rural Carriers ("Blooston") seek reconsideration of the Commission's decision to use a reverse auction format to distribute Mobility Fund Phase I support.⁴ Blooston reiterates the position it took prior to adoption of the *USF/ICC Transformation Order*, alleging that reverse auctions could lead to construction and equipment quality short-cuts that ultimately could require larger disbursements of high-cost support.⁵ Instead, Blooston urges the Commission to award support based on a qualitative analysis, to ensure that support is awarded to carriers that have a "legitimate" interest in building and maintaining high-quality services, such as rural carriers.⁶ Blooston contends that the *USF/ICC Transformation Order* did not adequately address concerns raised by it and other carriers about the effects of the reverse auction format on small rural wireless carriers, and was therefore arbitrary and

⁴ Petition for Partial Reconsideration of the Blooston Rural Carriers, WC Docket No. 10-90 *et al.*, filed December 29, 2011 ("Blooston Petition"). The Blooston Rural Carriers are a group of rural carriers represented by the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast LLP. The group consists of the following: Big Bend Telephone Company, Inc.; Butler-Bremer Communications; Clear Lake Independent Telephone Company; Custer Telephone Cooperative, Inc.; Gold Star Communications, LLC; Manti Telephone Company; Midstate Communications, Inc.; Northeast Louisiana Telephone Company, Inc.; NNTC Wireless, Inc.; Public Service Telephone Company; Penasco Valley Telephone Cooperative, Inc.; Sagebrush Cellular, Inc.; Smithville Telecom, LLC; Strata Networks; Walnut Telephone Company, Inc.; West Texas Rural Telephone Cooperative, Inc.; Wiggins Telephone Association; WUE, Inc.

⁵ See Blooston Petition at 3-4 (citing Blooston Rural Carriers, Comments, WT Docket No. 10-208, filed December 16, 2010, at 2-3 ("Blooston Comments")).

⁶ *Id.* at 4.

capricious.⁷ Blooston argues that the reverse auction model is vulnerable to “gaming strategies” and “anti-competitive bidding practices” that would unfairly benefit larger carriers.⁸

4. The Commission addressed Blooston’s arguments in the *USF/ICC Transformation Order*, and rejected the arguments by those, including Blooston, who claimed that a reverse auction format would allow larger carriers to bid more competitively than smaller providers.” The Commission determined that “both the auction design and natural advantages of carriers with existing investments in networks in rural areas should provide opportunities for smaller providers to compete effectively at auction.”¹⁰ The Commission rejected assertions that reverse auctions unduly harm small businesses, finding that the examples cited by commenters merely illustrated issues in implementing specific reverse auction programs, and did not demonstrate that reverse auctions are inherently biased against small businesses.¹¹

5. We are unpersuaded by Blooston’s claim that the only way to effectively encourage high-quality expansion into unserved areas is to ensure that Mobility Fund Phase I support is distributed based on a qualitative analysis of prospective carriers.¹² As the Commission concluded in the *USF/ICC Transformation Order*, for purposes of Mobility Fund Phase I, the difficulty in appropriately weighting differences in services provided outweigh the benefits that might be gained from such an approach.¹³ The Commission decided that a reverse auction is the best available tool for awarding support to eligible areas quickly and effectively.¹⁴ A well-designed system of competitive bidding will target support to those providers in an area that can meet the program requirements most cost-effectively. The bidding process will use competition among potential awardees to identify a support amount at which the bidder will commit to provide the required services, and below which no other competitor is willing to do so, thus minimizing the cost to the program. The qualitative proposal advanced by Blooston, in contrast, would require a subjective and time-consuming evaluation of a variety of factors that could result in delayed broadband deployment to unserved communities, would be much less likely to ensure that our limited support funds are disbursed as effectively as possible, and would require at least as much enforcement to ensure that consumers receive the desired broadband.

6. In response to Blooston’s claim that the reverse auction format could lead to short-cuts in construction and equipment quality, the Commission emphasized that it would, and in fact did establish

⁷ *Id.* at 6.

⁸ *Id.* at iii. The National Association of State Utility Consumer Advocates (“NASUCA”) opposes the Blooston Petition and argues that this and several other issues should be addressed in the context of the Further Notice of Proposed Rulemaking that was part of the *USF/ICC Transformation Order*. The National Association of State Utility Consumer Advocates and The New Jersey Division of Rate Counsel, Comments on Request for Reconsiderations, WC Docket No. 10-90 *et al.*, filed February 9, 2012, at 6 (“NASUCA Opposition”). While it would be appropriate to resolve any issues concerning Phase II of the Mobility Fund and other portions of the Connect America Fund in the Further Notice of Proposed Rulemaking, this Order on Reconsideration is the appropriate vehicle to address the Blooston arguments with respect to Phase I of the Mobility Fund. NASUCA also contends that reconsideration is inappropriate because the issue is presently before the 10th Circuit Court of Appeals. *Id.* We disagree. The Commission has authority to decide issues raised on reconsideration irrespective of whether the matter is the subject of judicial appeal.

⁹ *USF/ICC Transformation Order*, 26 FCC Red at 17782, paras. 325-26.

¹⁰ *Id.* at para. 326.

¹¹ *Id.*

¹² Blooston Petition at 4.

¹³ *USF/ICC Transformation Order*, 26 FCC Red at 17782, para. 327.

¹⁴ *Id.* at 17781, para. 322.

clear performance standards, and would effectively enforce them.¹⁵ Blooston's assertion that "no such standards" have been adopted is therefore incorrect.¹⁶ The Commission in the *USF-ICC Transformation Order* adopted a series of rigorous performance metrics for recipients of Mobility Fund Phase I funding, requiring them to provide mobile supported services over a 3G or better network that has achieved particular data rates under particular conditions and required submission of drive test data to demonstrate support recipients' compliance with their public interest obligation to provide mobile broadband.¹⁷ The Commission imposed a range of additional requirements on Mobility Fund Phase I recipients, including collocation and voice and data roaming, and established reporting requirements.¹⁸ Moreover, our requirement that support recipients maintain a Letter of Credit, along with traditional enforcement tools, helps to protect the government's interests in the funds it disburses and to ensure that performance obligations are met.¹⁹ In short, Blooston's petition contains no new arguments or data that would cause us to reconsider the adoption of the reverse auction format for the distribution of Mobility Fund Phase I support. Accordingly, we reject Blooston's claim that the Commission's adoption of the reverse auction format was arbitrary or capricious, and we affirm the Commission's conclusion that the auction mechanism adopted in the *USF-ICC Transformation Order*, coupled with eligibility and performance requirements, best ensures that mobile broadband is deployed quickly to unserved areas by well-qualified carriers.

B. Scope and Use of Mobility Fund Support

7. NTCH, Inc. ("NTCH") requests that the Commission link Phase I and Phase II funding to plan for the construction and ongoing operating costs of providing service in high cost areas.²⁰ NTCH notes that ongoing support may be necessary to sustain service in areas eligible for one-time assistance and that prospective bidders should know in advance whether they will receive Phase II support before competing in Phase I.²¹ NTCH therefore proposes that applicants be permitted to apply for Phase I and Phase II in an integrated way or, alternatively, to consolidate funding into a single phase that covers both construction and operational financial needs.²² NTCH concludes that this approach would allow the Commission to more meaningfully evaluate the real costs of providing service and performance.²³ NTCH also suggests that this approach will encourage new entrants who may be able to offer service for "significantly less" than the field of potential bidders who would otherwise qualify.²⁴ No parties commented on this aspect of NTCH's petition.

8. As the Commission noted in the *USF-ICC Transformation Order*, the goal in establishing the Mobility Fund Phase I is to provide the necessary "jump start" to immediately accelerate service to areas

¹⁵ *Id.* at 17782, para. 325.

¹⁶ Blooston Petition at 4.

¹⁷ *USF-ICC Transformation Order*, 26 FCC Red at 17791-93, paras. 359-74. We continue to use the terminology of the *USF-ICC Transformation Order* and use the terms "3G," "3G or better," "current generation," and "advanced" interchangeably to refer to mobile wireless services that provide voice telephony service on networks that also provide data services such as Internet access and email. *Id.* at 17773, para. 301 & n.497.

¹⁸ *Id.* at 17793-96, paras. 369-82.

¹⁹ *Id.* at 17810-12, paras. 444-51.

²⁰ NTCH, Inc., Petition for Reconsideration, WC Docket No. 10-90 *et al.*, filed December 29, 2011, at 10 ("NTCH Petition").

²¹ *Id.* at 7.

²² *Id.* at 10.

²³ *Id.*

²⁴ *Id.*

where it is cost effective to do so.²⁵ It is focused on identifying recipients that can extend coverage with one time support and is not intended to target areas where ongoing support is required, even if such areas technically might be eligible to seek Mobility Fund Phase I support.²⁶ By contrast, the Mobility Fund Phase II is intended to expand and sustain mobile voice and broadband services in communities in which service would be unavailable absent federal support.²⁷ It contemplates a larger budget, payable annually over a multi-year term, to bring service to areas that cannot be sustained with one-time support.²⁸ NTCH's petition does not persuade us that we should forgo the immediate benefits that could be provided by targeted support under Mobility Fund Phase I to integrate or consolidate it with Mobility Fund Phase II. In due course, Mobility Fund Phase II will be available for those areas that need support over the longer-term.

9. GCI requests that the Commission preclude use of Mobility Fund Phase I funding to construct middle mile facilities where adequate facilities are otherwise available.²⁹ GCI contends that the public interest would not be served by allowing support recipients to expend support on duplicative middle mile facilities, noting that the areas to be served by Mobility Fund Phase I are extremely "thin" and it is therefore important to aggregate demand to the extent possible.³⁰ No parties commented on this aspect of GCI's petition.

10. Consistent with the Commission's overall market-based approach to awarding support, we decline to condition Mobility Fund support in the manner GCI requests. We note that, as a general matter, the competitive bidding process adopted in the *USF-ICC Transformation Order* was designed to provide qualified recipients with an incentive to extend advanced mobile services in an efficient and cost effective manner, without prescribing any particular solution or limitations. We anticipate that, where middle mile facilities are adequate and available at reasonable rates, Mobility Fund participants will have a strong economic incentive to use existing facilities to offer services, especially given the specific build out obligations required in Mobility Fund Phase I.

C. Eligibility for Mobility Fund Phase I Support

1. Eligibility of Tier I Carriers

11. Blooston asserts that permitting Tier I carriers to participate in the Mobility Fund Phase I constitutes corporate welfare, as the average annual net income of such carriers purportedly demonstrates that they have no need for support.³¹ In addition, Blooston notes that the Commission previously concluded that a phase-down of the legacy Universal Service Fund support received by Verizon and Sprint was in the public interest and therefore contends that it would be contrary to the public interest for either of these entities to receive any new Mobility Fund Phase I support.³² Finally, Blooston contends that the Commission erred when it noted that a party's relinquishment of legacy support to meet legacy

²⁵ *USF-ICC Transformation Order*, 26 FCC Red at 17781, para. 324.

²⁶ *Id.* at 17781, para. 323 (rejecting arguments that Phase I will be inadequate to meet longer term needs).

²⁷ *Id.* at 17778–79, para. 314 (differentiating between the purposes of Phase I and Phase II).

²⁸ *Id.* at 17824, paras. 493–94. In the Further Notice of Proposed Rulemaking ("FNPRM") portion of the *USF-ICC Transformation Order*, the Commission proposed a fixed term of support of 10 years. *Id.* at 18074, para. 1138.

²⁹ General Communication, Inc., Petition for Reconsideration, WC Docket No. 10-90 *et al.*, filed December 23, 2011, at 21–22 ("GCI Petition").

³⁰ *Id.* at 21.

³¹ Blooston Petition at 12.

³² *Id.* at 10–11.

obligations should not be determinative of whether the party should be eligible for new support to meet new obligations.³³

12. AT&T Inc. ("AT&T") and Verizon Wireless ("Verizon") both oppose Blooston's petition. AT&T contends that the "Commission must reject out-of-hand any requests [such as this one] for the Commission to use universal service funding to discriminate against certain providers."³⁴ Verizon further notes that the Mobility Fund program did not exist at the time Verizon and Sprint committed to relinquish high-cost support.³⁵

13. We find Blooston's arguments unpersuasive. Phase I of the Mobility Fund targets one-time support to areas that current market-based incentives have left without 3G or better mobile networks—even by carriers with substantial resources. Thus, in these areas the apparent availability of resources has not, and will not, inevitably lead to speedy deployment of universal coverage. As AT&T notes in opposition to Blooston's petition, "market forces alone are insufficient to incent private investment by any provider—Tier 1 or otherwise—in those areas."³⁶ Our primary policy concern is with the consumers in those unserved areas who have been disadvantaged due to the lack of current generation mobile broadband networks. By permitting all qualified providers to participate in this reverse auction, we expect that our limited USF dollars will be used more efficiently and effectively to construct mobile broadband networks to cover more unserved areas.

14. Blooston's assertion that the phase-down commitments of Verizon and Sprint should make them ineligible for Mobility Fund Phase I support so as not to "undo the benefits reaped" from their withdrawal is also unpersuasive.³⁷ The Commission concluded that such limitations under past mechanisms should not carry over to the newly reformed support mechanisms, such as the Mobility Fund, and we will not disturb that conclusion.³⁸ A decision that a party should not continue to receive support available under the former identical support rule does not lead to a conclusion that the same party cannot be a recipient of more efficiently allocated targeted support under new mechanisms with additional public interest obligations.³⁹

2. ETC Designation

15. NTCH states that the Commission should hold in abeyance applications for eligible telecommunications carrier ("ETC") status pending the completion of competitive bidding for Mobility Fund support and then automatically qualify any party that receives Mobility Fund support as an ETC in the areas for which it applied.⁴⁰ NTCH contends that such an approach is necessary in order to enable

³³ *Id.* at 10.

³⁴ AT&T, Inc., Comments, WC Docket No. 10-90 *et al.*, filed February 9, 2012, at 32 ("AT&T Comments").

³⁵ Verizon Wireless, Opposition, WC Docket No. 10-90 *et al.*, filed February 9, 2012, at 11 ("Verizon Opposition").

³⁶ AT&T Comments at 33.

³⁷ Blooston Petition at 11–12.

³⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 17802 para. 408.

³⁹ See Verizon Opposition at 11–12.

⁴⁰ NTCH Petition at 9. In connection with its "streamlining" argument, NTCH also asserts that "[r]eceipt of [Mobility Fund] Phase II funding should be related to, not independent of or even inconsistent with, Phase I funding." *Id.* at 10. We address this argument separately.

participation in the Mobility Fund.⁴¹ Sprint comments favorably on this request, for the most part reiterating NTCH's arguments.⁴²

16. In the *USF/ICC Transformation Order*, the Commission considered suggestions that it circumvent the existing ETC regime for purposes of the Mobility Fund and declined to do so.⁴³ Most importantly, the Commission recognized that the existing ETC regime is built upon a statutory foundation that gives a significant role to the States as well as to the Commission.⁴⁴ The Commission concluded that the Mobility Fund should operate within the general structure of the Universal Service Fund with respect to ETC designation, rather than attempt to replace it. The Commission recognized the concern, echoed by NTCH and Sprint, that the obligations that accompany ETC status might make parties reluctant to become ETCs in advance of learning whether they would receive Mobility Fund support. The Commission addressed this concern by permitting parties to seek ETC designation on a conditional basis, that is subject to their becoming a winning bidder.⁴⁵

17. NTCH does not persuade us to revise the Commission's original conclusion. As noted in the *USF/ICC Transformation Order*, "requiring that applicants be designated as ETCs prior to a Mobility Fund Phase I auction may help ensure that the pool of bidders is serious about seeking support and meeting the obligations that receipt of support would entail."⁴⁶ It may be true, as NTCH contends, that more parties might participate in the auction if the Commission simply accepted the applicants' asserted willingness to seek ETC status. However, that approach risks the possibility that parties might participate and win --or otherwise affect the outcome of the auction-- and then be found unqualified to be ETCs. At a minimum, this would delay any use of funds that had been set aside for the winning bid. This would undermine our objective to extend mobile broadband networks as quickly as possible. Consequently, consumers living, traveling, and working in the unserved areas would suffer, contrary to our objectives for Mobility Fund Phase I. NTCH's further suggestion that any party qualifying to receive Mobility Fund support automatically should be designated as an ETC ignores the role given by statute to the states regarding the designation of many ETCs as well as the fact that ETC obligations themselves go beyond the requirements for participation in the Mobility Fund.⁴⁷ We, however, cannot ignore the obligations Congress requires for ETC designations, and deny NTCH's request for reconsideration.

⁴¹ *Id.* at 9.

⁴² Sprint Nextel Corporation, Comments, WC Docket No. 10-90 *et al.*, filed February 9, 2012, at 7-8. In response to this and several other issues raised in NTCH's petition, NASUCA argues that the petition should be denied and the issue addressed in the context of the Further Notice of Proposed Rulemaking (FNPRM) that was part of the *USF/ICC Transformation Order*. NASUCA Opposition at 17-18. While that is true with respect to Phase II of the Mobility Fund and other portions of the Connect America Fund, it is appropriate to address NTCH's arguments now with respect to Phase I of the Mobility Fund. NTCH has made similar arguments in comments it filed in response to the FNPRM and we will consider its arguments as they apply to Mobility Fund Phase II in the context of the FNPRM. See NTCH Comments, WC Docket No. 10-90 *et al.*, filed January 18, 2012 at 3-4.

⁴³ *USF/ICC Transformation Order*, 26 FCC Red at 17798-99, paras. 389-92.

⁴⁴ *Id.* at 17798, para. 390.

⁴⁵ See *id.* at 17809, para. 439; 47 C.F.R. § 54.1003(a).

⁴⁶ *USF/ICC Transformation Order*, 26 FCC Red at 17799, para. 392.

⁴⁷ See 47 U.S.C. § 214(e)(1) (statutory requirements with respect to use of facilities, provision of all supported services, and advertising the availability of service); see also 47 C.F.R. § 54.405 (all ETCs must offer Lifeline service).

3. Forbearance from Service Area Conformance Requirement of Section 214(e)(5)

18. NTCH also asks that the Commission forbear from applying the service area requirements of section 214(e)(5) to applicants seeking to become ETCs for purposes of the Mobility Fund. Section 214(e)(5) requires that a party seeking ETC status in a service area overlapping a rural telephone company's study area be designated for the entire study area, unless the Commission and relevant State jointly redefine the underlying study area of the rural telephone company.⁴⁸ We considered NTCH's request for forbearance in the context of our separate Order forbearing from the application of section 214(e)(5) to petitions for conditional ETC designation for purposes of participating in the Mobility Fund Phase I auction.⁴⁹ Accordingly, we do not address that aspect of NTCH's petition here.

4. Lifeline-Only ETCs

19. NTCH seeks clarification that a party designated as a Lifeline-only ETC can satisfy on that basis the Mobility Fund eligibility requirement that a participant be an ETC.⁵⁰

20. We deny NTCH's request. As an initial matter, when this Commission has designated parties as Lifeline-only ETCs, it has made clear that the designation is not effective for any other purpose.⁵¹ Thus, it is clear, under the terms of those orders, that these parties are not to be deemed ETCs for the Mobility Fund on the basis of their Lifeline-only designations. Moreover, many carriers designated as Lifeline-only ETCs do not offer service over their own facilities, or over a combination of their own and a third-party's facilities.⁵² It is not at all clear that these Lifeline-only ETCs will be in a position to undertake the materially different obligations that ETCs must satisfy in areas where they receive Mobility Fund Phase I support. We do not have a basis in this record to conclude that states that have designated Lifeline-only ETCs have evaluated the capability of such applicants to meet the obligations associated with the receipt of high-cost support. Consequently, we cannot draw a blanket conclusion that a party designated as a Lifeline-only ETC would be qualified to expand or deploy network facilities to meet a

⁴⁸ NTCH Petition at 9. In response to this and several other issues raised in NTCH's petition, NASUCA argues that the petition should be denied and the issue addressed in the context of the Further Notice of Proposed Rulemaking that was part of the *USF ICC Transformation Order*. NASUCA Opposition at 17-18. Although that is true with respect to Phase II of the Mobility Fund and other portions of the Connect America Fund, it is appropriate to address NTCH's arguments now with respect to Phase I of the Mobility Fund. NTCH has made similar arguments in comments it filed in response to the FNPRM and we will consider its arguments as they apply to Mobility Fund Phase II in the context of the FNPRM. See NTCH Comments, WC Docket No. 10-90 *et al.*, filed January 18, 2012, at 4-5.

⁴⁹ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Second Report and Order, FCC 12-70 (rel. June 27, 2012), 77 FR 39435 (rel. July 3, 2012).

⁵⁰ NTCH Petition at 8, 12. In response to this and several other issues raised in the NTCH Petition, NASUCA argues that the petition should be denied and the issue addressed in the context of the Further Notice of Proposed Rulemaking that was part of the *USF ICC Transformation Order*. NASUCA Opposition at 17-18. While it is true that the FNPRM provides a context to address any issues with respect to Phase II of the Mobility Fund and other portions of the Connect America Fund, it is appropriate to address NTCH's arguments now with respect to Phase I of the Mobility Fund.

⁵¹ See, e.g., *Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(f)*, CC Docket No. 96-45, Order, 20 FCC Red 15095, 15098, para. 6 (2005).

⁵² See 47 U.S.C. § 214(e)(1)(A); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, paras. 361-83 (rel. February 6, 2012) (forbearing from applying section 214(e)(1)(A)'s facilities requirement to Lifeline-only ETCs).

Mobility Fund recipient's public interest obligations and thus we require designation as an ETC generally.⁵³

5. Spectrum Access with Unlicensed Spectrum

21. Townes Telecommunications, Inc. ("Townes") requests that the Commission clarify that the Mobility Fund eligibility requirement of spectrum access can be satisfied with unlicensed spectrum used to meet or exceed the public interest requirements of the Mobility Fund. More specifically, Townes asserts that it has employed the xMax cognitive radio technology to provide the type of service that the Mobility Fund supports, and provides a link to a website describing the xMax technology. Townes also notes that the Commission has been supportive of the use of unlicensed spectrum in related contexts, such as the proposal for the Remote Areas Fund to provide fixed wireless service.⁵⁴

22. Although we support the use of unlicensed spectrum for developing innovative approaches to bring new technologies to consumers,⁵⁵ we decline the request to clarify our rules regarding the use of unlicensed spectrum to meet the spectrum access eligibility requirement for Mobility Fund Phase I. The *USF/ICC Transformation Order* required that an applicant have access, through a license or lease in effect prior to the auction, to spectrum necessary to fulfill all obligations related to support.⁵⁶ The Commission concluded that a provider's access to spectrum must support mobile broadband services meeting our requirements and conditions for the required timeframe.⁵⁷ We note that the use of unlicensed spectrum to support mobility over large areas is not proven at this time.

23. Thus, we conclude that the use of unlicensed spectrum to meet the spectrum access eligibility requirement for Mobility Fund Phase I would entail a significant risk that the mobile services deployed on such spectrum will not meet performance requirements and other obligations under the rules. This does not close the door to the possibility that unlicensed spectrum may play a complementary part in the provision of services supported by the Mobility Fund Phase I.⁵⁸ Nor does it prevent carriers from receiving high cost universal service support in other contexts for services provided over unlicensed

⁵³ This does not, of course, mean that such a party is necessarily unqualified to do so. However, nothing prevents such a party from seeking a full ETC designation in order to participate in the Mobility Fund.

⁵⁴ See Townes Telecommunications, Inc., Petition for Clarification or Partial Reconsideration, WC Docket No. 10-90 *et al.*, filed December 29, 2011 ("Townes Petition"). In response to this, NASUCA argues that the petition should be denied and the issue addressed in the context of the FNPRM that was part of the *USF/ICC Transformation Order*. NASUCA Opposition at 17-18. In reply, Townes notes that Phase I of the Mobility Fund is proceeding and the auction has been scheduled. Townes Telecommunications, Inc., Reply to Comments on Petition for Clarification or Partial Reconsideration, WC Docket No. 10-90 *et al.*, filed February 22, 2012, at 3. Although it is true that the FNPRM provides a context to address this issue with respect to Phase II of the Mobility Fund and other portions of the Connect America Fund, it is appropriate to address Townes's arguments now with respect to Phase I of the Mobility Fund because of the need to remove uncertainty about Phase I in advance of the application filing window.

⁵⁵ See, e.g., *Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 04-186, ET Docket No. 02-380, Second Memorandum Opinion and Order, 25 FCC Red 18661 (2010) (revising rules to allow for operation of unlicensed wireless devices in unused broadcast TV spectrum to provide broadband data and other services for consumers and businesses).

⁵⁶ *USF/ICC Transformation Order*, 26 FCC Red at 17799, para. 394.

⁵⁷ These requirements include: (1) providing mobile supported services over a 3G or better network that has achieved particular data rates under specified conditions, (2) providing reasonable collocation on new towers owned or managed by Mobility Fund Phase I recipients, and (3) complying with the Commission's voice and data roaming requirements. *Id.* at 17791-96, paras. 359-68, 376-77, 379-82.

⁵⁸ For instance, this could occur where handsets access Wi-Fi networks where available.

spectrum, e.g., for fixed wireless broadband services offered over unlicensed spectrum.⁵⁹ However, with respect to the Commission's current spectrum access requirement for Mobility Fund Phase I, we reject Townes' request to permit the use of unlicensed spectrum to meet this requirement.⁶⁰

D. Bidding Preferences

1. Preferences for Small Businesses and Rural Carriers

24. Blooston argues that the Commission should have adopted a mechanism for Phase I of the Mobility Fund that "assures that a significant portion of the Mobility Fund" is awarded to small rural wireless carriers.⁶¹ Blooston suggests that small and rural carriers have been successful at auction "only when adequate protections were implemented," such as "substantial bid credits," set asides, and the exclusion of large carriers.⁶² Blooston notes that the Commission is obligated under section 309(j) of the Communications Act⁶³ to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services and argues that the Commission should extend similar preferences to small and rural entities in the context of the Mobility Fund Phase I auction.⁶⁴

25. AT&T opposes Blooston's suggestions. AT&T notes that this proceeding does not involve a spectrum auction and is not governed by the statutory provisions of section 309(j). AT&T argues that the Blooston proposals are inconsistent with section 254 of the Communications Act, which governs the universal service program.⁶⁵ AT&T contends Blooston's approach would limit competition in the Mobility Fund Phase I auction, which could violate section 254(b)(1) and (b)(5)'s sufficiency and affordability objectives.⁶⁶ AT&T disputes Blooston's contention that small wireless carriers are better suited to meet the needs of local communities because "[a]ll winning wireless carrier bidders, large or small, will have the same service obligations."⁶⁷

26. Blooston replies that it is irrelevant that section 254 does not contain small business auction preference provisions that appear in section 309(j)(3) and (4).⁶⁸ Blooston maintains that the Commission's intention to draw upon established spectrum auction procedures for the Mobility Fund Phase I auction calls for adoption of similar preferences here.⁶⁹ Blooston cites the Universal Service

⁵⁹ See, e.g., *USF ICC Transformation Order*, 26 FCC Red at 17698-99, para. 98.

⁶⁰ We note that the *Auction 901 Procedures Public Notice*, stated that "only assured access is sufficient, which means that the access must be to licensed spectrum subject to limited access." *Mobility Fund Phase I Auction Scheduled for September 27, 2012. Notice and Filing Requirements and Other Procedures For Auction 901*, AU Docket No. 12-25, Public Notice, 27 FCC Red 4725, 4754, para. 96 (2012) ("*Auction 901 Procedures Public Notice*").

⁶¹ Blooston Petition at 5.

⁶² *Id.* at 6.

⁶³ 47 U.S.C. § 309(j)(3), (4).

⁶⁴ Blooston Petition at 7.

⁶⁵ *Id.* at 32; see also 47 U.S.C. § 254.

⁶⁶ Blooston Petition at 32-33 & n.107.

⁶⁷ *Id.* at 33.

⁶⁸ Reply to Oppositions to the Petition for Partial Reconsideration of the Blooston Rural Carriers, filed February 21, 2012, at 4-5 ("*Blooston Reply*").

⁶⁹ *Id.*

principle of competitive neutrality, which it characterizes as “requir[ing] that the Commission treat no carrier ‘unfairly,’” as authority for the provision of bidding credits and other assistance to small carriers.⁷⁰ Blooston asserts that only rural carriers would encourage the provision of service to rural communities not located near highways, claiming that larger carriers “are primarily interested in providing service to the interstate highways and major roads on which their customers travel.”⁷¹

27. We reject Blooston’s contentions that the Commission failed to examine the issues and concerns of small businesses and rural carriers as raised in the record in this proceeding.⁷² The Commission’s decision not to establish bidding preferences for small or rural entities in the auction of Mobility Fund Phase I support was neither arbitrary nor capricious, contrary to Blooston’s assertion. The Commission fully considered the views of Blooston and other parties responding to questions raised in the *Notice of Proposed Rulemaking* about potential ways to encourage the participation of the widest possible range of qualified entities, including smaller entities.⁷³ As previously noted, the Commission determined in the *USF/ICC Transformation Order* that reverse auctions are not inherently unfair to smaller carriers and that it was confident that the reverse auction format would enable smaller providers to compete effectively.⁷⁴ Given the limited and targeted purpose of the one-time Mobility Fund Phase I support, we do not find persuasive Blooston’s argument that our use of a reverse auction as a mechanism for distributing USF support requires us to adopt special provisions for small entities, such as the small business bidding credits the Commission awards to fulfill the statutory mandate in section 309(j)(3)(B) of the Act to disseminate spectrum licenses among a wide variety of applicants.⁷⁵

2. Expansion of Tribal Lands Bidding Credits

28. GCI seeks reconsideration of the Commission’s decision for the Mobility Fund Phase I auction to provide bidding credits to Tribally-owned or controlled providers seeking support to serve the Tribal lands with which they are associated.⁷⁶ GCI agrees with the Commission that service for Tribal lands should be prioritized, but maintains that bidding credits should be extended to all entities serving Tribal lands, not just those that are Tribally-owned or controlled.⁷⁷ GCI maintains that the *USF/ICC Transformation Order* does not explain why the credits should be limited to Tribally-owned or controlled entities. It asserts that because many qualifying Tribal lands are not served by a Tribally-owned or controlled entity, these lands will be unable to benefit from the bidding credits. GCI further asserts that

⁷⁰ *Id.*

⁷¹ *Id.* at 5-6.

⁷² *Id.* at 6.

⁷³ *Universal Service Reform: Mobility Fund*, Notice of Proposed Rulemaking, WT Docket No. 10-208, FCC 10-182, 25 FCC Red 14716, 14733, para. 55 (2010) (“*Mobility Fund NPRM*”).

⁷⁴ See *supra* para. 4 (citing *USF/ICC Transformation Order*, 26 FCC Red at 17782, para. 326 (stating that “both the auction design and natural advantages of carriers with existing investments in networks in rural areas should provide opportunities for smaller providers to compete effectively at auction” and rejecting assertions that reverse auctions unduly harm small businesses)). We note that a number of carriers of various sizes contributed to the record developed by the Bureaus in connection with their establishment of procedures for the upcoming Mobility Fund Phase I Auction, designated as Auction 901.

⁷⁵ See 47 U.S.C. § 309(j)(3)(B). In the FNPRM that was part of the *USF/ICC Transformation Order*, the Commission sought comment on the overall design for Phase II of the Mobility Fund, which will provide ongoing support for mobile broadband and high quality voice-grade services, and asked whether small businesses should be eligible for a bidding preference if competitive bidding is used to provide Mobility Fund Phase II support. *USF/ICC Transformation Order*, 26 FCC Red at 18077-78, paras. 1157-60. That issue remains under consideration.

⁷⁶ *USF/ICC Transformation Order*, 26 FCC Red at 17789-90, para. 355.

⁷⁷ GCI Petition at 20-21.

the exclusion of other entities from bidding credit eligibility could lead to inefficient operations and fragmented service, ultimately impairing broadband service.⁷⁸

29. We are not persuaded that eligibility for the Tribal lands bidding credit should be extended to entities that are not Tribally-owned or controlled providers. In adopting the Tribal lands bidding credit, the Commission sought to facilitate the self-provisioning of wireless broadband service by Tribes themselves by providing a bidding credit to increase the likelihood that Tribally-owned or controlled entities will receive funding.⁷⁹ This is consistent with our belief that encouraging Tribal-centric solutions to the communications needs of Tribal lands can be particularly advantageous. The Commission has previously found that Tribal-centric business models, ones “that actively engage the Native Nation, its core community institutions, and members in deployment and adoption planning - have a greater chance of establishing sustainable services on Tribal lands.”⁸⁰ A Tribal-centric approach has enabled a number of Native Nations to successfully establish service providers that have deployed critical communications infrastructure on Tribal lands.⁸¹ Extending bidding credits to all participants in the Mobility Fund Phase I auction would dilute our ability to achieve this objective.

E. Performance Requirements

1. Upgradability of Systems Built with Mobility Fund Support to 4G Technology

30. The Blooston Petition urges the Commission to require that Mobility Fund participants choosing to build 3G mobile wireless broadband networks, rather than 4G networks, use equipment and facilities “capable of ready, efficient and economical conversion” to 4G networks.⁸² Blooston argues that, with 4G service currently being rolled out in urban areas, it would be “unreasonably inefficient and wasteful” to use Mobility Fund support to deploy facilities and equipment that will soon be outmoded and need to be replaced in the immediately foreseeable future.⁸³ Blooston argues that it would be “far more efficient and less expensive” for the Mobility Fund if the Commission required facilities and equipment that can be readily and economically converted to 4G.⁸⁴

31. We decline to adopt the Blooston suggestion to require carriers who plan to build 3G networks with Mobility Fund support to use equipment and facilities that can easily convert to 4G. Requiring upgradable 3G equipment and facilities would add an extra layer of regulatory review and approval. Carriers choosing to build 3G networks with Mobility Fund support likely already face an economic incentive to install equipment that can be easily converted to 4G. But there may be carriers whose business plans indicate that another path is more economical—for example, because they want to deploy the same equipment used in its adjacent system—and we believe that those carriers will be in the

⁷⁸ *Id.*

⁷⁹ *USF-ICC Transformation Order*, 26 FCC Red at 17807, para. 430

⁸⁰ *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Red 2672, 2680, para. 12 (2011).

⁸¹ *Id.*

⁸² Blooston Petition at 15. Blooston notes that some 3G facilities and equipment can be readily and economically converted to 4G networks, while others cannot. Blooston asserts that “some of the non-convertible 3G facilities and equipment would have to be extensively reconfigured at great expense to provide 4G services.” *Id.*

⁸³ *Id.* at 16-17.

⁸⁴ *Id.* at 17. Alternatively, Blooston proposes postponing the Mobility Fund for a year or two until 4G facilities and equipment become readily available. *Id.* Given our objective to reach as many unserved areas as quickly as possible for the benefit of consumers, we reject the notion of postponing Mobility Fund Phase I.

best position to determine what equipment to use to meet the goals of the Mobility Fund. Imposing an additional regulatory requirement could limit participation in the auction or elicit higher bids, thereby interfering with the process the Commission chose to determine support, without providing clear benefits, overall, relative to the existing approach. Finally, we note that Mobility Fund Phase I recipients that choose to install 4G networks have an additional year to meet the performance requirements.⁸⁵ This should encourage 4G build-out where reasonable. Therefore, we find it unnecessary to add such a requirement limiting the type of equipment and facilities used by Mobility Fund Phase I support recipients. This conclusion does not prejudice our consideration of similar issues for Mobility Fund Phase II.

2. Roaming Requirement and Roaming Rates

32. Blooston petitions the Commission to request an expansion of the roaming requirement that the Commission established in the *USF/ICC Transformation Order*,⁸⁶ in order to ensure that roaming is available to Mobility Fund recipients throughout the United States.⁸⁷ Blooston also urges adopting measures to ensure that roaming is not only available, but also practically affordable for small carriers.⁸⁸ Without such a mandate, Blooston argues, small carriers will likely suffer losses from roaming arrangements since their customers often spend more time roaming than in their home network.⁸⁹ AT&T opposes Blooston's call for additional roaming regulations, noting that the Commission already has voice and data roaming rules in place and arguing that further regulation would be not only unnecessary but also unrelated to the universal service objectives.⁹⁰

33. NTCH also raises the issue of roaming on reconsideration, asking the Commission to adopt measures that will bring roaming rates down to "rational levels."⁹¹ NTCH argues that, without any action on this issue, rural customers' ability to roam outside their home networks may be limited and rural carriers will need more support.⁹² NTCH asks that all wireless carriers should have the right to roam on reasonable terms, which it defines as "rates that are not 700 or 800% higher than the rates offered by large carriers to their own customers, and rates that are not thousands of times higher than actual costs."⁹³ NTCH argues that if the Commission took action against unreasonable roaming rates, small carriers would spend less on roaming fees and therefore would need less support for high cost operations.⁹⁴

⁸⁵ *USF/ICC Transformation Order*, 26 FCC Rcd at 17792, para. 365.

⁸⁶ *Id.* at 17795–96, paras. 379–82.

⁸⁷ Blooston Petition at 8–9.

⁸⁸ *Id.* at 9. Blooston fails to details what these "steps" might be.

⁸⁹ *Id.* Blooston also notes that the customers of small carriers spend more time on other networks than other networks' customers spending roaming on networks of small carriers, resulting in higher roaming costs for small carriers relative to those of larger carriers. *Id.*

⁹⁰ AT&T, Inc. Reply Comments, WC Docket No. 10-90 *et al.*, filed February 17, 2012.

⁹¹ NTCH Petition at 12.

⁹² *Id.*

⁹³ *Id.* To determine what would be considered reasonable, NTCH advocates using the retail (or mobile virtual private network) rate offered by a carrier for a certain package of services as a cap on what can be charged as a roaming rate. *Id.* NTCH states that the package could, for example, consist of 1500 minutes of voice, 1200 text messages, and 500 Mbps of data. *Id.* NTCH asserts that a "carrier's roaming offering should be priced in a manner that . . . result[s] in a total cost that would yield that carrier the same return in a wholesale arrangement that they are accepting through either a [mobile virtual network operator] or retail arrangement." *Id.*

⁹⁴ *Id.*

34. We decline to expand the roaming requirements beyond those set forth in the *USF/ICC Transformation Order*. The *USF/ICC Transformation Order* required Mobility Fund recipients to comply with the Commission's current voice and data requirements on networks that are built through Mobility Fund support, and specifically made compliance with those rules a condition of receiving Mobility Fund support.⁹⁵ To add further measures regarding roaming access and affordability would be beyond the scope of the present proceeding. Moreover, the Commission engaged in an extensive rulemaking on roaming issues six months prior to adopting the *USF/ICC Transformation Order* and adopted specific rules that create a general mandate for data roaming.⁹⁶ The Commission noted in the *USF/ICC Transformation Order* that the Commission's existing processes would enable any interested party to file a formal or informal complaint if it believes that a Mobility Fund recipient has violated the roaming requirements.⁹⁷ Moreover, as described in the roaming proceeding, Accelerated Docket procedures, including pre-complaint mediation are among the various dispute resolution procedures available with respect to data roaming disputes.⁹⁸ Finally, the Commission observed in the *USF/ICC Transformation Order* that it has authority to initiate enforcement actions on its own motion.⁹⁹ Blooston and NTCH have not persuaded us to revisit the Commission's deliberations. Therefore, we deny Blooston's and NTCH's petitions with regard to their roaming requests.

3. Mobility Fund Recipients and Exclusive Handset Arrangements

35. In the Mobility Fund NPRM, we sought comment on other eligibility requirements for entities seeking to receive support from the Mobility Fund and specifically inquired whether there are any steps the Commission should take to encourage smaller eligible parties to participate in the bidding for support.¹⁰⁰ In its comments submitted in response to the *Mobility Fund NPRM*, Blooston suggested the Commission prohibit any carrier from participating in the Mobility Fund if it engages in exclusive arrangements for the design or procurement of handsets and other equipment.¹⁰¹ In the *USF/ICC Transformation Order*, the Commission declined to "bar any particular class of parties out of concern that they might appear to be better positioned to win Mobility Fund support."¹⁰² The Blooston Petition argues that the Commission's action was arbitrary and capricious in that it failed to specifically address the Blooston proposal to limit eligibility based on exclusive handset arrangements.¹⁰³ Blooston claims exclusivity arrangements for handsets and equipment "impair the service and competitive options of smaller carriers, deprive the customers of such smaller carriers of roaming capabilities and service features, and increase the cost of the mobile broadband services and equipment available to customers of smaller carriers."¹⁰⁴ AT&T opposes the Blooston proposal, arguing that such a prohibition is "nothing

⁹⁵ *USF/ICC Transformation Order*, 26 FCC Red at 17795-96, paras. 379-82.

⁹⁶ See generally *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Red 5411 (2011).

⁹⁷ *USF/ICC Transformation Order*, 26 FCC Red at 17796, para. 382.

⁹⁸ *Id.* at n.649 (citing *Roaming Second Report and Order*, 26 FCC Red at 5449-50, para. 77 and 47 C.F.R. § 1.730).

⁹⁹ *USF/ICC Transformation Order*, 26 FCC Red at 17796, para. 382.

¹⁰⁰ *Mobility Fund NPRM*, 25 FCC Red at 14733, para. 55.

¹⁰¹ Blooston Comments at 8-9.

¹⁰² *USF/ICC Transformation Order*, 26 FCC Red at 17802, paras. 407-08.

¹⁰³ Blooston Petition at 15. Blooston also argues that the Commission failed to engage in reasoned rulemaking. *Id.*; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 462 US 29, 43 (1983).

¹⁰⁴ Blooston Petition at 14.

more than a thinly veiled effort to bar larger wireless providers from competing for Mobility Fund support.”¹⁰⁵

36. The rationale behind the Commission’s decision not to bar any particular class of parties out of concern that they might appear to be better positioned to win Mobility Fund support, is that, in the Commission’s view, such restrictions could impede our primary goals for USF reform and the Connect America Fund, generally, or the Mobility Fund.¹⁰⁶ Specifically, these goals include the deployment of mobile broadband networks in currently unserved areas in as cost effective a manner as practicable.¹⁰⁷ Blooston’s argument to restrict parties who have entered into exclusive handset arrangements could similarly impede these goals of USF/ICC reform. Therefore, we deny the Blooston Petition’s request that we prohibit recipients of Mobility Fund Phase I support from utilizing exclusive arrangements for handsets or other equipment.

4. Build-out Requirements for AWS-3 Licensees

37. In its Petition for Reconsideration of the *USF/ICC Transformation Order*, NTCH urges the Commission to amend the rules for Advanced Wireless Service in the 2155-2175 MHz band (“AWS-3”) to explicitly link the use of that spectrum with the build-out of unserved areas.¹⁰⁸ As part of this, NTCH proposes “barring or severely handicapping companies who already own significant spectrum in a given market from acquiring even more.”¹⁰⁹ NTCH asserts that current spectrum holders have spectrum but are not utilizing it, while other carriers cannot get more spectrum.¹¹⁰ Therefore, NTCH urges the Commission to “skew[] the AWS-3 auction in the direction of competing carriers” and condition licensing AWS-3 on meeting the goals of Mobility Fund.¹¹¹

38. CTIA opposes NTCH’s proposal for AWS-3.¹¹² Noting that AWS-3 rules are the subject of other Commission proceedings, CTIA argues that any modifications of them in the present proceeding would be “procedurally improper,” particularly given the absence of any notice that AWS-3 would be considered in the USF docket.¹¹³ In addition to the procedural considerations, CTIA finds NTCH’s proposal “unwise,” noting that many parties have expressed interest in pairing the AWS-3 spectrum with 1.7 GHz spectrum, which NTIA is currently considering reallocating from the Federal government to

¹⁰⁵ AT&T Comments at 32, 34.

¹⁰⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17802, paras. 407–09.

¹⁰⁷ *Id.* at 17772–73, para. 298.

¹⁰⁸ NTCH Petition at 13–14.

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 14. NTCH provided further information about its AWS-3 proposal in its January 18, 2012, comments. See generally NTCH, Inc., Comments, WC Docket No. 10-90 *et al.*, filed January 18, 2012. NTCH argues that instead of paying carriers to provide the 3G or better service, the Commission could “essentially be paid for the same thing by offering the available spectrum at a discount determined by the market to offset the cost of providing the services.” *Id.* at 5. NTCH claims this proposal would increase the number of potential providers, create a stronger incentive to avoid non-performance with the possible loss of license, relieve the Commission of short and long term distributions from USF, and streamline administrative processes by eliminating the Mobility Fund auctions and ETC designations for multiple applicants. *Id.* at 5–6. NTCH further advocates limiting the AWS-3 spectrum to entities that do not already hold spectrum in the area, requiring interoperability over the entire AWS band, and tying roaming rates to reasonable costs. *Id.* at 6–7.

¹¹² CTIA-The Wireless Association, Opposition and Comments, WC Docket No. 10-90 *et al.*, filed February 9, 2012 (“CTIA Opposition”).

¹¹³ *Id.* at 2, 3, 13–14.

commercial use.¹¹⁴ CTIA contends that such a pairing would be ideal for mobile broadband, which it argues would further the Commission's goals for the Mobility Fund and broadband generally.¹¹⁵ Given its support for pairing AWS-3 and 1.7 GHz, CTIA therefore opposes what it terms NTCH's "designer allocation" of the AWS-3 spectrum.¹¹⁶

39. In response, NTCH acknowledges that "the parameters of AWS-3 are still in flux," but argues that, if the AWS-3 auction would occur in the second half of 2013, the six to nine month delay would be "well worth the savings to the public."¹¹⁷ NTCH adds that conditioning AWS-3 licenses on meeting the Mobility Fund objectives would also eliminate the post-Mobility Fund auction application review envisioned in the *USF/ICC Transformation Order*.¹¹⁸

40. We decline to use this proceeding to adopt service and auction rules for AWS-3 as NTCH suggests. NTCH's proposal focuses on access to spectrum, not on USF reform.¹¹⁹ We agree with CTIA that such rules are beyond the scope of this proceeding. Moreover, the goal of the Mobility Fund is to expand 3G or better service to unserved areas, and carriers are able to utilize various frequency bands so long as the spectrum will support the required services to meet the Mobility Fund performance requirements.¹²⁰ Focusing Mobility Fund deployment on one frequency band, as NTCH proposes, would likely reduce the participation in the program, increase the costs of providing service, and therefore, decrease the area and people that will benefit from new service.¹²¹ Therefore, we deny NTCH's petition with regard to its proposal to condition AWS-3 spectrum on meeting the Mobility Fund requirements.

II. PROCEDURAL MATTERS

A. Paperwork Reduction Act

41. This Fourth Order on Reconsideration does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

¹¹⁴ *Id.* at 14 (citing National Telecommunications and Information Administration, Second Interim Progress Report on the Ten-Year Plan and Timetable, October 17, 2011).

¹¹⁵ *Id.* at 14-15.

¹¹⁶ *Id.* at 15.

¹¹⁷ NTCH, Inc., Consolidated Reply to Oppositions to Petition for Reconsideration, WC Docket No. 12-90 *et al.*, filed February 21, 2012, at 4-5 ("NTCH Reply").

¹¹⁸ *Id.* at 5.

¹¹⁹ As NTCH and CTIA both note, the Commission is in the process of determining the best use of the AWS-3 spectrum. It does not appear that NTCH filed its Petition for Reconsideration or Reply in that docket.

¹²⁰ *USF/ICC Transformation Order*, 26 FCC Red at 17800-01, paras. 397-99.

¹²¹ Moreover, as NTCH itself appears to acknowledge, were we to condition AWS-3 spectrum on meeting Mobility Fund performance requirements in unserved areas, we might not achieve the highest value of the spectrum. NTCH Reply at 4-5.

B. Congressional Review Act

42. The rules previously adopted in the *USF/ICC Transformation Order* were submitted to Congress and the Government Accountability Office pursuant to the Congressional Review Act¹²² and remain unchanged by this Order.

III. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and sections 1.1 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.429, that this Fourth Order on Reconsideration IS ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register.

44. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and sections 0.331 and 1.429 of the Commission's rules, 47 C.F.R. § 0.331 and 47 C.F.R. § 1.429, that the Petition for Partial Reconsideration filed by the Blooston Rural Carriers on December 29, 2011 IS DENIED.

45. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and sections 0.331 and 1.429 of the Commission's rules, 47 C.F.R. § 0.331 and 47 C.F.R. § 1.429, that the Petition for Reconsideration filed by NTCH, Inc. on December 29, 2011 IS DENIED IN PART to the extent described herein.

46. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and sections 0.331 and 1.429 of the Commission's rules, 47 C.F.R. § 0.331 and 47 C.F.R. § 1.429, that the Petition for Reconsideration filed by General Communications, Inc. on December 23, 2011 IS DENIED IN PART to the extent described herein.

47. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and sections 0.331 and 1.429 of the Commission's rules, 47 C.F.R. § 0.331 and 47 C.F.R. § 1.429, that the Petition for Clarification or Partial Reconsideration filed by Townes Telecommunications, Inc. on December 29, 2011 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹²² See 5 U.S.C. 801(a)(1)(A).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Interpretation of Economically Burdensome)	
Standard;	)	CG Docket No. 11-175
)	
Amendment of Section 79.1(f) of the)	
Commission's Rules;)	
Video Programming Accessibility)	
)	

REPORT AND ORDER

Adopted: July 19, 2012

Released: July 20, 2012

By the Commission:

I. INTRODUCTION

1. In this *Report and Order*, we determine that the four factors contained in section 713(e) of the Communications Act (Act) will continue to apply when evaluating individual requests for captioning exemptions under section 713(d)(3) and our corresponding rules, notwithstanding a change in terminology in the statute, enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),¹ which replaced the term “undue burden” in that section with the term “economically burdensome.” We further amend section 79.1 of the Commission’s rules to replace all current references to “undue burden” with the term “economically burdensome.” These rule amendments correspond with the new statutory language in the CVAA requiring petitioners seeking individual closed captioning exemptions under section 713(d)(3) of the Act to show that providing captions on their programming would be economically burdensome.

II. BACKGROUND

2. In 1996, Congress added section 713 to the Act, establishing requirements for closed captioning on video programming to ensure access by persons with hearing disabilities to television programming,² and directing the Commission to prescribe rules to carry out this mandate.³ In 1997, the Commission adopted rules and implementation schedules for closed captioning, which became effective on January 1, 1998.⁴ The Commission’s closed captioning rules currently require video programming

¹ CVAA, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.); Pub. L. No. 11-265, 124 Stat. 2795 (2010) (technical amendments to the CVAA).

² Section 305 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613) (“1996 Amendments”).

³ 47 U.S.C. §§ 613(b), (c).

⁴ See 47 C.F.R. § 79.1; *Closed Captioning and Video Description of Video Programming. Implementation of Section 305 of the Telecommunications Act of 1996. Video Programming Accessibility*, MM Docket No. 95-176. Report and Order, 13 FCC Red 3272 (1997) (“*Closed Captioning Report and Order*”). *Closed Captioning and Video Description of Video Programming. Implementation of Section 305 of the Telecommunications Act of 1996. Video*

(continued....)

distributors (VPDs)⁵ to caption 100% of all new, non-exempt English and Spanish language programming.⁶

3. Section 713 of the Act authorizes the Commission to grant individual exemptions from the television closed captioning requirements. Individual exemptions are considered on a case-by-case basis upon submission of a petition to the Commission.⁷ As originally enacted, section 713 authorized the Commission to grant individual closed captioning exemptions upon a showing that providing closed captioning would “result in an undue burden.”⁸ Section 713(e) of the Act defines “undue burden” to mean “significant difficulty or expense,” and directs the Commission to consider the following factors in making undue burden determinations: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.⁹

4. The CVAA amended section 713(d)(3) of the Act by replacing the term “undue burden” with the term “economically burdensome.”¹⁰ As amended, section 713(d)(3) states:

A provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome.¹¹

(...continued from previous page)

Programming Accessibility, MM Docket No. 95-176, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (“*Closed Captioning Reconsideration Order*”).

⁵ A “video programming distributor” is defined as (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor (MVPD) as defined in Section 76.1000(e); and (3) any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. 47 C.F.R. § 79.1(a)(2).

⁶ 47 C.F.R. §§ 79.1(b)(1)(iv) and (b)(3)(iv).

⁷ 47 U.S.C. § 613(d)(3). Any entity in the programming distribution chain, including the provider, producer or owner of the programming, may petition the Commission for an individual exemption under section 79.1(f) of the Commission’s rules. A “video programming provider” is defined as “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. § 79.1(a)(3). A petitioner may seek an exemption for “a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider.” 47 C.F.R. § 79.1(f)(1).

⁸ Pub. L. 104-104, Title III, sec. 305, 110 Stat. 126 (1996) (1996 Amendments to Communications Act.)

⁹ 47 U.S.C. § 613(e). The Commission’s rules mirror the statutory criteria for making undue burden determinations. See 47 C.F.R. § 79.1(f)(2). Any petitioner filing under this section also may present for the Commission’s consideration “any other factors the petitioner deems relevant to the Commission’s final determination,” including alternatives that might constitute a reasonable substitute for closed captioning. 47 C.F.R. § 79.1(f)(3).

¹⁰ Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3). The CVAA made two additional changes to section 713(d) of the Act. First, the new law codifies existing Commission policy that during the pendency of an exemption petition, a provider or owner shall be exempt from having to provide closed captioning. Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3). See also 47 C.F.R. § 79.1(f)(11). Second, Congress directed the Commission to act upon an exemption petition filed under section 713(d) of the Act within six months after receiving the petition, unless the Commission finds that an extension of this period is necessary to determine whether the captioning requirements are economically burdensome. Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3).

¹¹ 47 U.S.C. § 613(d)(3)(2010).

5. On October 20, 2011, the Commission adopted an order (*Interim Standard Order*), offering provisional guidance on how to interpret this statutory change.¹² The Commission determined that Congress did not intend to make a substantive change in the standard for evaluating individual exemption petitions under section 713(d)(3) of the Act, but rather simply to change the nomenclature in section 713 from “undue burden” to “economically burdensome.”¹³ Accordingly, the *Interim Standard Order* provisionally directed the Consumer and Governmental Affairs Bureau (CGB) to continue to use the “undue burden” factors contained in section 713(e) and codified in sections 79.1(f)(2) and (3) of the Commission’s rules when making determinations as to whether an individual petitioner has made a showing that providing closed captioning would be “economically burdensome.”¹⁴ In a *Notice of Proposed Rulemaking (NPRM)* accompanying the *Interim Standard Order*, the Commission proposed to make permanent its decision to continue utilizing the “undue burden” factors when evaluating individual exemption petitions under the CVAA’s new language, and sought comment on this proposal.¹⁵ The Commission also proposed to replace all current references to “undue burden” in section 79.1(f) of its rules with the term “economically burdensome” in order to conform the rules to the new terminology introduced by the CVAA.¹⁶

6. In response to the *NPRM*, the Commission received only a single comment, jointly filed by Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups).¹⁷ Consumer Groups state that the Commission’s proposed interpretation of the economically burdensome standard is consistent with Congress’s expressed and unambiguous intent not to change substantively the factors that are used to evaluate individual exemption petitions.¹⁸ They add that even if Congress’s intent was ambiguous, the Commission’s interpretation is reasonable and furthers the purposes of the Act and the CVAA to maximize the availability of closed captioned programming while allowing for individual exemptions where providing captions would impose a “truly untenable burden.”¹⁹ Interpreting section 202(c) of the CVAA to require a change in the four-factor “undue burden” standard used for individual exemption petitions, they say, would risk restricting the scope of programming accessible to consumers who are deaf or hard of hearing and thereby contravene the overall purpose of the Act and the CVAA.²⁰ Finally, Consumer Groups suggest that the purpose of section 202(c) of the CVAA, as a “conforming amendment,” was to “harmonize[] the language of section 713(d)(1) of the Act, which refers to “economically burdensome,” section 713(d)(3) of the Act, which refers to “undue burden,” and

¹² The *Interim Standard Order* was part of a multi-part Commission decision containing a Memorandum Opinion and Order, an Order, and a Notice of Proposed Rulemaking. See *Anglers for Christ Ministries, Inc., New Beginning Ministries, Petitioners Identified in Appendix A, Interpretation of Economically Burdensome Standard: Amendment of Section 79.1(f) of the Commission’s Rules: Video Programming Accessibility*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC Red 14941 (2011) (*Interim Standard Order* when referring to the Order portion, and *NPRM* when referring to the NPRM portion).

¹³ *Interim Standard Order*, 26 FCC Red at 14958, ¶ 32.

¹⁴ *Interim Standard Order*, 26 FCC Red at 14961, ¶ 37. This provisional guidance applied to all exemption petitions filed or re-filed subsequent to October 8, 2010, the date on which the CVAA became law. *Interim Standard Order*, 26 FCC Red at 14961, ¶ 37.

¹⁵ *NPRM*, 26 FCC Red at 14961, ¶ 38.

¹⁶ *NPRM*, 26 FCC Red at 14961-62, ¶ 39.

¹⁷ Consumer Groups Comments (Dec. 1, 2011).

¹⁸ Consumer Groups Comments at 1, 6, citing, S. Rep. No. 111-386 at 14.

¹⁹ Consumer Groups Comments at 1 and 6.

²⁰ Consumer Groups Comments at 8.

section 713(e) of the Act, which interchangeably refers to “undue burden” and “undue economic burden.”²¹

III. DISCUSSION

7. For purposes of evaluating individual exemptions under section 713(d)(3) of the Act, we determine that Congress intended the term “economically burdensome” to be synonymous with the term “undue burden” as defined by section 713(e) of the Act and as interpreted and applied in Commission rules and precedent. This conclusion is supported by the CVAA itself, which preserves, unchanged, the language in section 713(e) defining an “undue burden” and enumeration of the factors to be considered in an “undue economic burden” analysis, and by the CVAA’s legislative history, which affirms that the Commission should continue using these factors in assessing individual exemption requests.²² As explained in the *Interim Standard Order*, the CVAA described the change in nomenclature as a “conforming amendment,” without further elaboration.²³ Thus, because Congress did not specifically define the term “economically burdensome,” but instead retained the “undue burden” factors identified in section 713(e)²⁴ and “encourage[d] the Commission, in its determination of ‘economically burdensome’ to use the factors listed in section 713(e).”²⁵ we believe Congress did not intend to make a substantive change in the standard for evaluating individual exemption petitions under section 713(d)(3) of the Act, but rather simply to change the nomenclature in section 713 from “undue burden” to “economically burdensome.”²⁶

8. Accordingly, for the reasons set forth in the *Interim Standard Order* and *NPRM*, reiterated herein, and supported by the record,²⁷ we conclude that Congress did not intend any substantive change to the criteria that the Commission consistently has used for individual closed captioning petitions when, in adopting the CVAA, Congress amended section 713(d)(3) of the Act to replace the term “undue burden” with the term “economically burdensome.” We therefore will interpret the term “economically burdensome” in section 713(d)(3) as being synonymous with the term “undue burden” as defined in section 713(e) of the Act. We note that this interpretation is consistent with the manner in which the Commission has interpreted the term “economically burdensome” in the Commission’s recently adopted video description rules²⁸ and in our rules governing the delivery of closed captioning on video programming delivered using Internet protocol,²⁹ both of which were adopted pursuant to the CVAA.

²¹ Consumer Groups Comments at 8-9.

²² 47 U.S.C. § 613(e).

²³ *Interim Standard Order*, 26 FCC Rcd at 14958, ¶ 32, citing, Pub. L. No. 111-260 § 202(c).

²⁴ 47 U.S.C. § 613(e).

²⁵ Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 111-386, 111th Cong., 2nd Sess. at 14 (2010) (S. Rep. No. 111-386).

²⁶ *Interim Standard Order*, 26 FCC Rcd at 14958, ¶ 32.

²⁷ As noted above, we received no objection to our interim ruling or proposed rule change and, indeed, the sole commenter in this proceeding supports this interpretation and rule change.

²⁸ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 26 FCC Rcd 11847, 11868 at ¶ 44 (2011) (“[W]e intend to ‘use the same factors as applied to the undue burden standard’ . . . to determine whether the rules are economically burdensome (i.e., whether they impose significant difficulty or expense).”) (citation omitted).

²⁹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 55 Communications Reg. (P&F) 205, 2012 WL 122407 at ¶ 64 (2012) (“[W]e disagree with any suggestion that the Commission should apply the broader standards applicable to categorical exemption requests to our consideration of individual exemption requests in the IP closed captioning context. Rather, we interpret the term ‘economically burdensome’ in Section 713(d)(3) (continued....)

Accordingly, the Commission, and CGB under delegated authority, will continue to evaluate individual exemption petitions filed under section 713(d)(3) of the Act³⁰ using the four factors set forth in section 713(e) of the Act.³¹

9. As proposed in the *NPRM*, we further amend sections 79.1(d)(2)³² and 79.1(f)(1), (2), (3), (4), (10), and (11) of our rules to replace all current references to "undue burden" with the term "economically burdensome" to conform our rules to the new language in the CVAA.³³

IV. PROCEDURAL MATTERS

10. *Regulatory Flexibility Act Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),³⁴ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."³⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³⁷ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁸

11. In this *R&O* we are conforming the terminology used in section 79.1(f) of the Commission's rules to the requirements of section 202 of the CVAA. Under the rule amendments adopted herein, a petitioner seeking a waiver of closed captioning requirements will have to demonstrate that compliance with such captioning requirements would be "economically burdensome" as mandated by the CVAA. Prior to this amendment, the Act and our rules required a petitioner to show that complying with the captioning requirements would constitute an "undue burden." In mandating this change of

(...continued from previous page)

of the Act, as amended by the CVAA, to be synonymous with the term "undue burden" as this section was originally drafted.") (citation omitted).

³⁰ 47 U.S.C. § 613(d)(3). See also 47 C.F.R. § 79.1(f).

³¹ 47 U.S.C. § 613(e). See also 47 C.F.R. § 79.1(f)(2).

³² The *NPRM* did not propose to amend section 79.1(d)(2) of the rules. See *NPRM*, 26 FCC Red at 14961-14962, ¶ 39 and Appendix B. Nevertheless, the amendment to section 79.1(d)(2) adopted herein is consistent with the amendments to replace all current "undue burden" references to "economically burdensome" in section 79.1(f) as well as the proposal to "make clear that petitioners seeking individual exemptions from the captioning rules must now show that providing captions on their programming would be "economically burdensome." *NPRM*, 26 FCC Red at 14961-14962, ¶ 39.

³³ See *NPRM*, 26 FCC Red 14989-90 proposed rule changes in Appendix B at 47 C.F.R. §§ 79.1(d)(2) and 79.1(f)(1), (2), (3), (4), (10), and (11).

³⁴ The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

³⁵ 5 U.S.C. § 605(b).

³⁶ 5 U.S.C. § 601(6).

³⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

³⁸ 15 U.S.C. § 632.

terminology, we conclude that Congress intended no substantive change to the factors used to evaluate individual petitions for closed captioning exemptions. Because no substantive changes to our rules or procedures were contemplated by the *NPRM*, we concluded in the *NPRM* that the proposed change in our rules to reflect the terminology adopted by Congress in section 202 of the CVAA would have no economic impact on small business entities or consumers and included in the *NPRM* an Initial Regulatory Flexibility Certification.

12. No comments were received concerning the Certification, and we find no reason to change our conclusions as contained in that Certification. Therefore, we certify that the rule amendments adopted in this *R&O* will not have a significant economic impact on a substantial number of small entities. They contain no new obligations or prohibitions. Nor do they remove any requirements or have substantive implications of any sort. They simply change the nomenclature utilized by our rules to describe the showing that must be made by petitioners submitting individual closed captioning exemption requests to warrant waiver of the captioning requirements, as mandated by Congress in section 202 of the CVAA. The Commission will send a copy of this *R&O*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.³⁹ In addition, the *R&O* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.⁴⁰

13. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

14. *Congressional Review Act.* The Commission will send a copy of this *R&O* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613, this *R&O* IS ADOPTED and the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix A.

16. IT IS FURTHER ORDERED that the *R&O* SHALL BE EFFECTIVE 30 days after publication in the *Federal Register*.

17. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

18. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

³⁹ *See* 5 U.S.C. § 801(a)(1)(A).

⁴⁰ *See* 5 U.S.C. § 605(b).

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Revised Rules

Part 79 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 79 – CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for Part 79 continues to read as follows:

Authority: 47 U.S.C. 613

2. Section 79.1 is amended by revising paragraph (d)(2), the heading to paragraph (f), and paragraphs (f)(1), (f)(2), (f)(3), (f)(4), (f)(10), and (f)(11) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(d) * * *

* * * * *

(2) *Video programming or video programming provider for which the captioning requirement has been waived.* Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning is economically burdensome on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

* * * * *

(f) *Procedures for exemptions based on economically burdensome standard.*

(1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will be economically burdensome.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would be economically burdensome. The term “economically burdensome” means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning are economically burdensome include:

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the provider or program owner;
- (iii) The financial resources of the provider or program owner; and
- (iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. The extent to which the provision of closed captions is economically burdensome shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

(10) The Commission may deny or approve, in whole or in part, a petition for an economically burdensome exemption from the closed captioning requirements.

(11) During the pendency of an economically burdensome determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

APPENDIX B**List of Commenters**

1. Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application of New Cingular Wireless PCS, LLC) U.S. File No. 0004352233
and NEATT Wireless, LLC)
)
For Consent to Assign Licenses)

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2012

Released: July 24, 2012

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the application filed by New Cingular Wireless PCS, LLC ("New Cingular"), an indirect, wholly-owned subsidiary of AT&T Inc. ("AT&T"), and NEATT Wireless, LLC ("NEATT" and collectively with New Cingular and AT&T, the "Applicants") to assign 13 broadband personal communications service ("PCS") licenses in five CMAs¹ in rural Arkansas from NEATT to New Cingular (hereinafter, "AT&T").² Our analysis suggests that, notwithstanding a Commission-imposed condition requiring divestiture of part of this spectrum by Cingular, the proposed acquisition of NEATT's broadband PCS licenses is unlikely to cause competitive or other public interest harms and that it is in the public interest to grant the application.

II. BACKGROUND

A. Description of Applicants

1. AT&T Inc.

2. AT&T, incorporated in Delaware and headquartered in Dallas, Texas, is a communications holding company that wholly owns New Cingular.³ With its subsidiaries, affiliates, and operating companies, AT&T is among the leading providers of telecommunications services in the United States and around the world.⁴ At the end of 2011, AT&T had more than 103 million wireless

¹ Cellular Market Areas ("CMAs") are the areas in which the Commission initially granted licenses for the cellular service. See 47 C.F.R. § 22.90.

² See Application of New Cingular Wireless PCS, LLC and NEATT Wireless, LLC for Assignment of Broadband PCS Licenses, File No. 0004352233 (filed Aug. 24, 2010, amended Sept. 28, 2010 and Dec. 14, 2010) ("Application").

³ See AT&T Inc., SEC Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended December 31, 2011, EX-13 41 ex13.htm AT&T INC. 2011 ANNUAL REPORT at 5 (filed Feb. 24, 2012) ("AT&T 2011 10-K EX-13 41").

⁴ See AT&T Inc., SEC Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended December 31, 2011, at 1 (filed Feb. 24, 2012).

connections,⁵ and earned \$63.2 billion in total wireless revenues, of which \$56.7 billion were service revenues.⁶

2. NEATT

3. NEATT was founded in 2004 and is based in Chicago, Illinois.⁷ Percy L. Berger, Sr. is the Chairman, President, and Chief Executive Officer.⁸ The Dempster Group LLC ("Dempster") holds a 42.5 percent interest in Northeastern Arkansas Telephone and Transport, L.L.C. ("NEATT LLC"), which in turn owns 100 percent of NEATT. Mr. Berger owns 100 percent of Dempster and also directly owns 17 percent of NEATT LLC.⁹

B. Description of Transaction

4. The Applicants seek Commission consent to assign NEATT's 13 broadband PCS licenses to AT&T in five CMAs (25 counties) in Arkansas, with a total population of approximately 690,000.¹⁰ The Applicants state that the proposed transaction would create several public interest benefits, including allowing AT&T to increase its system capacity to enhance existing services and facilitate the provision of additional products and services to the public.¹¹ Specifically, the additional spectrum would, according to the Applicants, enable the deployment of HSPA/UMTS¹² technologies and the provision of additional wireless broadband products and services in these markets while maintaining or improving service quality on its GSM/EDGE¹³ network.¹⁴

5. The majority of the licenses involved in this transaction are part of the operating units that the Commission required AT&T to divest as a condition to the *Cingular-AT&T Wireless Order*.¹⁵

⁵ AT&T 2010 10-K EX-13 41at 5.

⁶ AT&T 2010 10-K EX-13 41at 5.

⁷ Bloomberg Businessweek, NEATT Wireless, L.L.C. Company Information, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=27993213> (last visited Feb. 21, 2012).

⁸ Application, Declaration of Percy L. Berger, Sr. at ¶ 1.

⁹ File No. 0004008000, Form 602 filed for NEATT Wireless LLC, Indirect Ownership, Percy L. Berger, Sr. (filed Oct. 26, 2009).

¹⁰ The five CMAs in Arkansas are CMA 326 (Arkansas 3 - Sharp), CMA 327 (Arkansas 4 - Clay), CMA 328 (Arkansas 5 - Cross), CMA 329 (Arkansas 6 - Cleburne), and CMA 330 (Arkansas 7 - Pope). See Application of New Cingular Wireless PCS, LLC and NEATT Wireless, LLC for Assignment of Broadband PCS Licenses, File No. 0004352233.

¹¹ Public Interest Statement at 1.

¹² The term "HSPA" means High Speed Packet Access and the term "UMTS" means Universal Mobile Telecommunications technology.

¹³ The term "GSM" means Global System for Mobile Communications technology and the term "EDGE" means Enhanced Data rates for GSM Evolution technology.

¹⁴ Public Interest Statement at 3, 6.

¹⁵ See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WI Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Red 21522, 21620 ¶ 254 (2004) ("*Cingular-AT&T Wireless Order*"). The subject application includes 13 licenses. Eight of these licenses were the subject of divestiture in the *Cingular-AT&T Wireless Order*; five of the subject licenses are not governed by the conditions set forth in the *Cingular-NEATT Order*. See generally Applications of AT&T Wireless Services and Cingular Wireless Corporation, Emergency Joint Petition of NEATT Wireless, L.L.C. and Cingular Wireless L.L.C. for Partial Waiver to Transfer (continued....)

AT&T assigned eight of the licenses included in this transaction to NEATT as a part of the required divestiture, and the parties now seek Commission consent to reassign these licenses to AT&T.

C. Transaction Review Process

6. On August 24, 2010, the Applicants filed an application, pursuant to section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"),¹⁶ seeking Commission approval to assign the subject licenses from NEATT to AT&T. The Applicants amended the application on September 28, 2010 and December 14, 2010.¹⁷ On February 8, 2011, the Commission released a public notice seeking comment on the proposed transaction.¹⁸ The *Comment Public Notice* established a pleading cycle for the application, with petitions to deny due February 22, 2011, oppositions due March 4, 2011, and replies due March 11, 2011. In response to the *Comment Public Notice*, no petitions or comments were filed, nor has any party filed subsequently opposing the transaction.¹⁹

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

7. Pursuant to section 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed assignment and transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity.²⁰ We use here the standard of review and public interest framework that the Commission consistently applies in evaluating wireless transactions, most recently articulated in the Commission's order approving the assignment of licenses from Qualcomm Incorporated to AT&T Inc.²¹

IV. QUALIFICATIONS OF APPLICANTS

8. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."²² In general, when evaluating assignments under section 310(d), we do not reevaluate the

(Continued from previous page)

Previously Divested Customer Base to Prevent Loss of Service. *Order*, 20 FCC Red 19795 (2005) ("*Cingular-NEATT Order*"). See also *infra* at ¶ 9.

¹⁶ 47 U.S.C. § 310(d).

¹⁷ See amendments at FCC File No. 0004352233.

¹⁸ New Cingular Wireless PCS, LLC and NEATT Wireless, LLC Seek FCC Consent to the Assignment of Broadband PCS Licenses. ULS File No. 0004352233. *Public Notice*, 26 FCC Red 1283 (2011) ("*Comment Public Notice*").

¹⁹ The only filings in this proceeding were two *ex parte* notices by AT&T. See *Ex Parte* Letter from Joan Marsh, Counsel to AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (Aug. 5, 2011); *Ex Parte* Letter from Joan Marsh, Counsel to AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (Oct. 3, 2011).

²⁰ 47 U.S.C. § 310(d).

²¹ See generally Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations. WT Docket No. 11-18. *Order*, 26 FCC Red 17589 (2011) ("*AT&T-Qualcomm Order*").

²² *Id.* §§ 308, 310(d). See also, e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17600-01 ¶ 27; AT&T Inc. and Celco Partnership d/b/a Verizon Wireless Seek FCC Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement. WT Docket No. 09-104. *Memorandum Opinion and Order*, 25 FCC Red 8704, 8718 ¶ 26 (2010) ("*AT&T-Verizon Wireless Order*"); *Cingular-AT&T Wireless Order*, 19 FCC Red at 21546 ¶ 44.

qualifications of the transferor.²³ The exception to this rule occurs where issues related to basic qualifications of the assignor have been designated for a hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.²⁴ This is not the case here. Thus, we need not reevaluate NEATT's basic qualifications. Section 310(d) of the Communications Act also obligates the Commission to consider whether the proposed transferee is qualified to hold Commission licenses.²⁵ No issues have been raised in this proceeding concerning the basic qualifications of the proposed assignee, AT&T, which has previously and repeatedly been found qualified, through its subsidiaries, to hold Commission licenses. We therefore find that there is no reason to re-evaluate the basic qualifications of AT&T.

V. DISCUSSION

A. Competitive Analysis

9. *Overview.* The Applicants seek Commission consent for the assignment from NEATT to AT&T of 13 broadband PCS licenses in five markets in rural Arkansas. In the 2004 *Cingular-AT&T Wireless Order*, the Commission required Cingular to divest AT&T Wireless's operating units in these five markets, including eight spectrum licenses associated with these operating units²⁶ as a condition of the transaction in order to address competitive concerns.²⁷ Cingular and NEATT entered into an agreement, pursuant to which Cingular continued to provide network, billing, software support, and other related functions to NEATT until such time as it could obtain and deploy such services on its own, but no later than December 31, 2005.²⁸ In late 2005, NEATT and Cingular filed an emergency joint petition for partial waiver, requesting that NEATT be permitted to reassign to Cingular the customer contracts that had been divested by Cingular to NEATT in March 2005 pursuant to the divestiture condition in the *Cingular-AT&T Wireless Order*.²⁹ In the 2005 *Cingular-NEATT Order*, the Commission allowed Cingular to reacquire the NEATT customer contracts in order to prevent potential disruption and loss of

²³ See, e.g., Applications of Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, 23 FCC Red 17570, 17582-83 ¶ 23 (2008) ("*Sprint Nextel-Clearwire Order*"); Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Red 17444, 17464 ¶ 31 (2008) ("*Verizon Wireless-ALLTEL Order*").

²⁴ See, e.g., *Sprint Nextel-Clearwire Order*, 23 FCC Red at 17582-83 ¶ 23; *Verizon Wireless-ALLTEL Order*, 23 FCC Red at 17464 ¶ 31.

²⁵ See, e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17601 ¶ 28; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8720 ¶ 29; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21546 ¶ 44.

²⁶ See *supra* n. 11.

²⁷ See *Cingular-AT&T Wireless Order*, 19 FCC Red at 21620 ¶ 254.

²⁸ See Applications of AT&T Wireless Services and Cingular Wireless Corporation, Emergency Joint Petition of NEATT Wireless, LLC and Cingular Wireless LLC for Partial Waiver to Transfer Previously Divested Customer Base to Prevent Loss of Service, Order, 20 FCC Red 19795, 17977 ¶ 4 (2005) ("*Cingular-NEATT Order*").

²⁹ See NEATT Wireless, LLC and Cingular Wireless LLC Emergency Joint Petition for Partial Waiver to Transfer Previously Divested Customer Base to Prevent Loss of Service, Emergency Joint Petition for Partial Waiver, Expedited Action Requested, at 1 (filed Nov. 29, 2005). The 2005 Order identified the relevant party as "Dempster" rather than "NEATT." As described above, see para. 3 *supra*, Dempster is a significant investor in NEATT.

service to NEATT's customers.³⁰ The spectrum licenses, however, remained with NEATT. In the *Cingular-NEATT Order*, the Commission stated in a footnote that it "expect[s] that these [NEATT] licenses and assets will not be acquired by the primary incumbents in the Arkansas Markets, but rather that they will be made available to enable entry or expanded service by another provider."³¹

10. In August of 2010, NEATT filed applications to reassign the licenses back to the primary incumbent from which they had been originally assigned pursuant to the Commission's order in 2004.³² As discussed below, after examining the special circumstances due to the changes in the marketplace since 2004, as well as the current competitive conditions in the relevant markets, we find that it is unlikely that there would be competitive harm if we allow AT&T to reacquire the broadband PCS licenses at issue and that it is in the public interest to allow the assignment.

11. *Product and Geographic Markets.* In this Memorandum Opinion and Order, as in the Commission's most recent transactions, we evaluate the proposed transaction using a combined "mobile telephony/broadband services" product market, which is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services).³³ As in the Commission's analysis of previous transactions, we use the CMA as the relevant local geographic market in which to evaluate this proposed transaction.³⁴

12. *Input Market for Spectrum and Spectrum Concentration.* This transaction does not involve the acquisition of customers³⁵ or result in a change in the number of facilities-based service providers in any of the markets, and thus, we consider only the competitive effect of spectrum concentration.³⁶ The Commission examines the effects of spectrum aggregation on the marketplace on a case-by-case basis.³⁷ As one means of evaluating potential competitive harms, the Commission applies an initial screen to identify markets where the amount of spectrum that would be held post-transaction provide reason for further competitive analysis of spectrum concentration.³⁸

³⁰ See *Cingular-NEATT Order*, 20 FCC Red at 19795 ¶ 1.

³¹ *Cingular-NEATT Order*, 20 FCC Red at 19799, n.34.

³² See Application of New Cingular Wireless PCS, LLC and NEATT Wireless, LLC for Assignment of Broadband PCS Licenses, File No. 0004352233.

³³ See e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17603 ¶ 33; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8721 ¶ 35; *Sprint Nextel-Clearwire Order*, 23 FCC Red at 17585-86 ¶¶ 33-38.

³⁴ See, e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17604 ¶ 34; Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Red 13915, 13934 ¶ 41 (2009) ("*AT&T-Centennial Order*").

³⁵ We note that in 2005, the Commission permitted Cingular to reacquire the NEATT customer contracts in order to prevent potential disruption and loss of service to NEATT's subscribers. See *Cingular-NEATT Order*, 20 FCC Red at 19795 ¶ 1. See also *supra* ¶ 10.

³⁶ See, e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17607-08 ¶ 43; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8720 ¶ 30; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21556 ¶ 68.

³⁷ *AT&T-Centennial Order*, 24 FCC Red at 13938 ¶ 50; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21525 ¶ 4; Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Red 19078, 19113 ¶ 63 (2004) ("*Rural Report and Order*").

³⁸ See, e.g., *AT&T-Qualcomm Order*, 26 FCC Red at 17602 ¶ 31; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8720-8721 ¶ 32; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21552 ¶ 58. Because the instant transaction does (continued....)

13. Our analysis shows that in each of the five CMAs that are the subject of this transaction, AT&T's total post-transaction spectrum holdings do not trigger the Commission's overall spectrum screen.³⁹ AT&T's post-transaction spectrum holdings in the five relevant markets range from 63 to 78 megahertz in total, with the maximum holdings being below one-third of the total spectrum that is suitable and available in the near term for the provision of mobile telephony/broadband services.⁴⁰ Further, each of the other nationwide providers holds substantial amounts of spectrum in these markets.⁴¹ Our competitive analysis, however, does not end here given that this transaction involves reacquisition of divested spectrum pursuant to the *Cingular-AT&T Wireless Order*, adopted in 2004. As discussed below, in light of the Commission's divestiture requirement in the *Cingular-AT&T Wireless Order* and the statement in the *Cingular-NEATT Order*, we further analyze the competitive conditions in the marketplace to determine whether allowing AT&T to reacquire spectrum licenses in these markets would be likely to cause any competitive harms or otherwise disserve the public interest, or, in contrast, whether allowing AT&T to reacquire this spectrum would serve the public interest.

14. We find that changes in the competitive landscape during the past eight years since the Commission's divestiture condition in the *Cingular-AT&T Wireless Order* make it unlikely that there would be competitive harm if we allow AT&T to reacquire the broadband PCS licenses at issue from NEATT. Similarly, we find that the Commission's "expectation" expressed in the *Cingular-NEATT Order* that these licenses would not be acquired by the primary incumbents in the Arkansas markets is no longer applicable given these changes.⁴² Since the 2004 *Cingular-AT&T Wireless Order*, total spectrum suitable and available for the provision of wireless telephony/broadband services has increased considerably. In 2004, there was approximately 200 megahertz of suitable and available spectrum.⁴³ Today, however, more than double that amount of spectrum is suitable and available for the provision of mobile wireless services.⁴⁴ Given its status as a primary incumbent, AT&T currently holds only limited

(Continued from previous page) _____
not result in the acquisition of wireless business units and customers or change the number of firms in the market, we do not apply an initial screen based on the size of the post-transaction Herfindahl-Hirschman Index ("HHI") of market concentration and the change in the HHI.

³⁹ In the *AT&T-Qualcomm Order*, the Commission stated that it "may find it appropriate to reduce the amount of suitable SMR spectrum included in the screen." *AT&T-Qualcomm Order*, 26 FCC Rcd at 17607 ¶ 42. However, even if we were to make this adjustment to the spectrum screen, AT&T's total post-transaction spectrum holdings would still not trigger the screen in any of the markets. See *AT&T-Qualcomm Order*, 26 FCC Rcd at 17607 ¶ 41 (noting that under any version of the overall spectrum screen relatively few, or no, local markets are triggered for further competitive analysis); *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 3720-21 ¶ 32; *AT&T-Centennial Order*, 24 FCC Rcd at 13935 ¶ 34; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶¶ 41, 43.

⁴⁰ Of the five CMAs (25 counties), in only two counties in CMA 326 (Arkansas 3 – Sharp) would AT&T have 78 megahertz of total spectrum post-transaction. AT&T would hold in the other four CMAs, at the most, 73 megahertz of total spectrum post-transaction. AT&T's maximum post-transaction spectrum holdings are below one-fourth of the total spectrum that is suitable and available in the near term for the provision of mobile telephony/broadband services.

⁴¹ Verizon Wireless holds 77-92 megahertz of spectrum, Sprint-Nextel holds 46-113 megahertz, and T-Mobile holds 30-60 megahertz of spectrum. Other firms that hold at least 20 megahertz of spectrum include CenturyTel, Leap, and SpectrumCo AWS.

⁴² In light of the circumstances noted herein, the directions with respect to these licenses in our previous orders are hereby modified to be consistent with the result we reach – approving the requested transfer of licenses from NEATT to AT&T.

⁴³ See *AT&T-Cingular Wireless Order*, 19 FCC Rcd at 21560-61 ¶ 81.

⁴⁴ This includes cellular, PCS, Specialized Mobile Radio ("SMR"), and 700 MHz band spectrum, as well as AWS-1 and Broadband Radio Service ("BRS") spectrum where available.

spectrum in these markets – 43 megahertz of total spectrum in the markets involved in this transaction, including no PCS spectrum. AT&T currently uses 25 megahertz of cellular spectrum to serve its customer base for voice and 3G broadband service.⁴⁵ AT&T's only other spectrum in these markets is slated for near-term uses – 6 megahertz of unpaired 700 MHz spectrum recently acquired from Qualcomm to be used for supplemental downlink, and 12 megahertz to be used to roll out its 4G LTE.⁴⁶ AT&T, post-transaction, would hold no more than 78 megahertz of spectrum, which is in line with the spectrum holdings of the other nationwide providers in these markets. In addition, T-Mobile has significantly expanded its population and area coverage⁴⁷ and Sprint Nextel has also increased its coverage since 2004.⁴⁸ Further, in one CMA, Leap has significant population coverage and has begun to provide coverage in two other markets.⁴⁹

15. In addition, the record reveals that NEATT made a good faith effort to find a buyer for these licenses for more than two years, and during this period, AT&T was the only company that made an offer to acquire this spectrum.⁵⁰ In the Applicants' Public Interest Statement and the attached declarations,⁵¹ the Applicants provide details concerning NEATT's good faith efforts to sell these spectrum assets to a variety of potential purchasers.⁵² NEATT was unable to find a buyer, other than AT&T, that would offer to acquire its spectrum.⁵³ For the past eight years, NEATT has not been using the spectrum at issue to serve customers in these markets.⁵⁴ The most likely alternative to NEATT's purchase agreement with AT&T in these markets would be to have this spectrum continue to lay fallow.

⁴⁵ See AT&T, *AT&T Coverage Map*, available at <http://www.att.com/network/> (last visited Apr. 9, 2012).

⁴⁶ See *AT&T-Qualcomm Order*, 19 FCC Rcd at 17593 ¶ 14 (citing to the Applicants' Public Interest Statement regarding AT&T's use of Qualcomm's spectrum). See, e.g., *4G LTE Available in Washington, DC*, Press Release, available at <http://www.att.com/gen/press-room?pid=21937&cdvn=news&newsarticleid=33215> (last visited Apr. 5, 2012); *AT&T to Roll Out 4G LTE in Dallas*, Press Release, available at <http://www.att.com/gen/press-room?pid=19876&cdvn=news&newsarticleid=31957> (last visited Apr. 5, 2012) (stating that "AT&T plans to deliver 4G LTE over 700 MHz, as well as 1700/2100 MHz AWS spectrum").

⁴⁷ Commission analysis of American Roamer coverage maps, October 2011, and census block population data from the 2010 Census. See also T-Mobile, *T-Mobile Coverage Map*, available at <http://www.t-mobile.com/coverage/pcc.aspx> (last visited Apr. 9, 2012).

⁴⁸ Commission analysis of American Roamer coverage maps, October 2011, and census block population data from the 2010 Census. See also Sprint Nextel, *Sprint Nextel Coverage Map*, available at <http://coverage.sprintpcs.com/IMPACT.jsp?INTNAV=ATG:HE:Cov> (last visited Apr. 9, 2012).

⁴⁹ Commission analysis of American Roamer coverage maps, October 2011, and census block population data from the 2010 Census. See also Leap, *Leap (Cricket) Coverage Map*, available at <http://www.mycricket.com/coverage/maps/broadband> (last visited Apr. 9, 2012).

⁵⁰ See Public Interest Statement at 5-6; Application, Percy L. Berger, Sr. Declaration at ¶¶ 3-6; Application, Brian Harvey Declaration at ¶ 7. "[O]nly AT&T was willing to bid for the spectrum and to negotiate and enter into a definitive purchase agreement." Application, Brian Harvey Declaration at ¶ 8.

⁵¹ The statements made in these declarations were "under penalty of perjury," which is consistent with what is required under section 1.16 of the Commission's rules. See 47 CFR § 1.16.

⁵² See Public Interest Statement at 5-6; Application, Percy L. Berger, Sr. Declaration at ¶¶ 3-6. NEATT, through Falkenberg Capital, contacted over 25 entities, which included "major wireless operators, regional wireless operators, small market spectrum owners, and landline telecommunications companies with a presence in or near the area covered by NEATT's licenses." Application, Brian Harvey Declaration at ¶ 7.

⁵³ Public Interest Statement at 5-6; Application, Percy L. Berger, Sr. Declaration at ¶¶ 3-6; Application, Brian Harvey Declaration at ¶¶ 5-10.

⁵⁴ See Public Interest Statement at 4.

which we find would not be in the public interest.⁵⁵ Based on our analysis and the discussion above, we find that AT&T's proposed acquisition of NEATT's broadband PCS licenses is unlikely to cause competitive or other public interest harms and it would serve the public interest to allow AT&T to reacquire the broadband PCS licenses at issue from NEATT to effectuate the transaction-specific public interest benefits that the Applicants claim will occur.⁵⁶

B. Potential Public Interest Benefits

16. In addition to assessing the potential competitive harms associated with the proposed *AT&T-NEATT* transaction, we also consider whether the proposed assignment of spectrum is likely to generate verifiable, transaction-specific public interest benefits.⁵⁷ In doing so, we determine whether the proposed assignment would result in demonstrable and verifiable benefits to consumers that would not be pursued otherwise.⁵⁸

17. The Applicants assert that the proposed assignment "will enable AT&T to achieve greater operational efficiencies and offer improved, more robust and advanced services to meet the needs of new and existing subscribers."⁵⁹ According to the Applicants, the additional spectrum sought in this transaction is necessary for AT&T to deploy new broadband service and continue to offer quality coverage in the affected markets.⁶⁰ The Applicants state that the spectrum proposed to be acquired in this transaction would make it possible for AT&T to deploy broadband UMTS services while maintaining or improving service quality on its GSM/EDGE network.⁶¹

18. As noted above, the proposed transaction does not present any competitive or other harms. As a result, we require a lesser showing of public interest benefits by the Applicants. In the end, we conclude, based on the record before us and as discussed above, that this transaction is likely to result in meaningful transaction-specific public interest benefits that support grant of the Commission's approval to the proposed transaction.

C. Conclusion

19. In conclusion, based on the record before us, we find that the Applicants have demonstrated that the assignment of these 13 broadband PCS licenses in five CMAs in Arkansas from NEATT to AT&T would serve the public interest, convenience, and necessity. Accordingly, the Commission hereby grants the application.

VI. ORDERING CLAUSES

20. Accordingly, having reviewed the application and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the application for assignment of 13 broadband PCS

⁵⁵ NEATT is not presently providing service to customers and therefore this proposed transaction would enable spectrum that has been lying fallow to be put to use in serving customers. *See id.* at 4.

⁵⁶ *See id.* at 2-3, 6.

⁵⁷ *See, e.g., AT&T-Qualcomm Order*, 19 FCC Red at 17622-23 ¶ 81; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8736 ¶ 73; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21599 ¶ 201.

⁵⁸ *See, e.g., AT&T-Qualcomm Order*, 19 FCC Red at 17622-23 ¶ 81; *AT&T-Verizon Wireless Order*, 25 FCC Red at 8736 ¶ 73; *Cingular-AT&T Wireless Order*, 19 FCC Red at 21599 ¶ 201.

⁵⁹ Public Interest Statement at 2-3.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 6.

licenses in five CMAs in Arkansas (Arkansas 3 - Sharp), CMA 327 (Arkansas 4 - Clay), CMA 328 (Arkansas 5 - Cross), CMA 329 (Arkansas 6 - Cleburne), and CMA 330 (Arkansas 7 - Pope) from NEATT Wireless, LLC to New Cingular Wireless PCS, LLC, ULS File No. 0004352233, is GRANTED.

21. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary



*** 5707**

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